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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1075

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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October Term, 1973
No. .....

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The petitioner, Michael G. Thevis, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 12, 1973.

Opinions Below.

The opinion of the Court of Appeals is reported in 484 F.2d 1149, and appears in Appendix A hereto. The opinion of the District Court is reported in 329 F.Supp.265, and appears in Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 12, 1973. Due and timely petitions for rehearing and petitions for rehearing

en banc, filed respectively by petitioner and by the Government, were denied by the Court of Appeals by Order entered on November 15, 1973. A copy of the said Order appears as Appendix C hereto. By Order of Mr. Justice Powell, dated December 14, 1973, the time for filing a petition for writ of certiorari in the above entitled case was extended to and including January 10, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, was unconstitutionally vague, violating the First and Fifth Amendments, because:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and nonexistent;

(c) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous;"

(d) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under Section 1462.

2. Whether the indictment in statutory language is fatally defective because it failed to inform petitioner of the nature and cause of the indictment against him, in violation of the applicable provisions of the Sixth Amendment.

3. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, under a standard for judging *scienter* solely by alleged proof of knowledge of the "contents" of the publications involved, and without competent evidence to establish that petitioner knew the contents of the said publications, abridge the freedoms of speech and press and arbitrarily deprive petitioner of his liberty and property without due process of law, in violation of the First and Fifth Amendments.

4. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, where the indictment, trial, and conviction of petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs*, and where the Government presented no evidence that the publications exceeded national commu-

nity standards or were utterly without redeeming social value, and where the undisputed record established that the publications did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First and Fifth Amendments.

5. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, where the publications named in the indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First and Fifth Amendments.

6. Whether the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction of petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs* and *Miller* tests by the Court of Appeals, abridge the exercise of freedoms of speech and press, arbitrarily deprive petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the provisions of the First and Fifth Amendments and Article I, Section 9.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments, and Article I, §9 of the Constitution, and the pertinent provisions of 18 U.S.C. Section 1462 appear in Appendix D hereto.

Statement.

1. The twelve-count indictment herein, returned in the United States District Court for the Middle District of Florida on May 14, 1970, charged the petitioner, Michael G. Thevis, and a corporation, Peachtree News Company, Inc., with violations of Title 18 United States Code, Section 1462. The trial under the indictment was conducted before the Honorable Joe J. Fisher, United States District Judge, a jury trial having been waived. On June 25, 1971, the District Court rendered a Memorandum Opinion and Order (Appendix B), adjudging petitioner and the corporate co-defendant guilty of the charges contained in each of the counts of the indictment. The petitioner, Thevis, was sentenced to imprisonment for a period of five years as to each of the counts, to run concurrently, on condition that petitioner be confined in a jail-type institution for a period of six months, the execution of the remainder of the sentence suspended and petitioner placed on active probation for five years. The petitioner was also fined the sum of $5,000 as to each of the 12 counts, but petitioner was only required to pay $1,000 as to each of the counts, or an aggregate sum of $12,000, the remaining balance being suspended. [R.T. 760-761.][1] Petitioner was enlarged on $10,000 bail pending appeal.

2. Prior to trial, a motion to dismiss the indictment was made on behalf of the petitioner. [R.T. 24-33, 51-150.] Among other things, the petitioner alleged that the provisions of 18 U.S.C. Section 1462, on their face and as construed and applied, violated the provisions

[1]The reference "R.T." is to the two-volume Appendix filed by petitioner in the Court of Appeals below.

of the First and Fifth Amendments because the said provisions were vague and overbroad and failed to provide adequate safeguards and standards for the protection of material ordinarily entitled to the guarantees of the First Amendment. It was further urged that the provisions of the law, on their face and as construed and applied, failed to require or charge knowledge on the part of petitioner of the alleged obscene character and alleged obscene contents of the material. It was also alleged in the motion to dismiss that the publications charged in the indictment against petitioner were not obscene as a matter of law under the Constitution. The motion was denied. There were also motions for new trial [R.T. 764-988], and in arrest of judgment [R.T. 989-1,015] which raised, among other things, the same constitutional issues. The motions were denied.

3. With respect to the issue of obscenity, at the trial the Government offered only one witness, Blaine Edmund McLaughlin, a physician and psychiatrist [R.T. 368], who testified solely on the alleged prurient interest of the publications. The petitioner offered as expert witnesses John William Money, Associate Professor of Medical Psychology at Johns Hopkins University, School of Medicine, with extended expertise in the areas of sex education and sexual behavior [R.T. 608-653], and Franklin Calhoun, a clinical psychologist. [R.T. 682-714.] The Government offered no evidence to establish that the publications exceeded national community standards in the depiction or representation of

sex, or that the said publications were utterly without redeeming social value. The petitioner's expert witnesses testified that the publications did not appeal to the prurient interest of the average person or any member of a deviate group, and that the publications did have educational and other social value.

4. The opinion rendered by the District Court [Appendix B] makes clear that the publications herein are not "hard-core pornography". The District Judge emphasized that the case was being decided under *Roth* and *Memoirs* and quoted the tripartite standards enunciated by this court for judging obscenity. It was conceded by the District Judge that "the evidence in our case does not involve obtrusive dissemination or an environment in which the material is likely to fall into the hands of juveniles, and the magazines in question were not pandered."

5. The Court of Appeals held, among other things, that the motion to dismiss the indictment was properly denied; that the indictment did not have to specify the elements of obscenity; and that in following the general language of the statute, the indictment did not omit any essential elements of the offense for which petitioner had been convicted. On the issue of *scienter*, the court held that proof of knowledge or notice of the contents of the material is sufficient. The court also held that the failure of the Government to prove by competent evidence that the material here involved exceeded contemporary community standards or was ut-

terly without redeeming social value did not vitiate the judgment of conviction.

The court further declared, in the light of *Miller*, that the "utterly without redeeming social value" test and the national community standards test were no longer governing. The court recognized that the statute was required to define specific sexual conduct, but held that the statutory requirement could be satisfied by a judicial gloss. The court held that the *Miller* quintet did not preclude application of the *Memoirs* standard to material involved in transactions occurring in 1970. However, to assure that no one is convicted under standards allegedly more restrictive than those in *Miller*, the court decided that it would employ both the *Miller* and *Memoirs* definitions of obscenity. On this basis, the court concluded that all of the magazines were obscene under *Miller*, but that six were protected by the *Memoirs* requirement because they were not "utterly without redeeming social value". Thus, the judgment of conviction as to six counts was reversed, and affirmed as to the other six counts.

As heretofore stated, both petitioner and the Government petitioned for rehearing and for rehearing en banc. The Government, in its petition, maintained that only the standards enunciated in *Miller* should be applied to the material charged in the indictment. The Government argued that the test enunciated in *Memoirs* was not a constitutional standard and that the replacement of that standard by *Miller* did not violate the *ex post facto* clause of the Constitution. The said petitions for rehearing were denied by the Court of Appeals. (Appendix C.)

REASONS FOR GRANTING THE WRIT.

1. The judgment against the petitioner herein is in direct conflict with cases decided subsequently thereto in the Ninth and Tenth Circuits. *United States v. Henson,* unreported, (9 Cir., No. 73-2063, October 5, 1973);[2] *United States v. Friedman and Peachtree Distributors, Inc.,* unreported, (10 Cir., No. 72-1143-1144, December 11, 1973).[3] In *Henson,* as in the case at bar, a judgment of conviction was rendered by utilizing the *Roth-Memoirs* test. In vacating the judgment of conviction, the court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part re-

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[2]A copy of the *Henson* Opinion is attached hereto as Appendix E. The Government, in seeking rehearing, with a suggestion for a rehearing en banc, stated: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson,* 11). On December 3, 1973, the court made an order in *Henson,* deferring action on the Government's petition for rehearing with suggestion for rehearing en banc, "pending the court's disposition of a number of cases now pending before the full court en banc, the disposition of which may affect the court's opinion in the subject case."

[3]A copy of the *per curiam* opinion in *Friedman* is attached hereto as Appendix E.

> pudiated and in which *some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.*" (Emphasis added.)

After vacating the judgment of conviction, the court remanded the case to the district court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State,* 300 N.E.2d 100 (August 21, 1973), and *Mohney v. State,* 300 N.E.2d 66 (August 21, 1973), wherein the Indiana Supreme Court declared that State's obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisions.

In *United States v. Friedman, et al., supra,* the court vacated an obscenity conviction and remanded to the district court for a new trial. The court stated that it was its view

> "that the several recent [obscenity] decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. . . . These decisions . . . require a re-examination of the facts of this case together with the determination of what may be the applicable standards. . . . A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be."

2. In light of the Court's rulings on June 21, 1973, the provisions of Title 18 United States Code, Section 1462, on their face and as construed and applied to authorize the judgment of conviction against petitioner herein, were unconstitutionally vague. Petitioner has

been denied due process, in its primary sense, having been convicted of violating a statute which failed to provide him with adequate notice of the conduct proscribed by Section 1462.

Section 1462, on its face and as construed and applied to petitioner, is unconstitutionally vague, because:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent;

(c) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous;"

(d) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under Section 1462.

A. Prior to June 21, 1973, Section 1462 was unconstitutionally vague, because it failed to contain a description of the sexual conduct *Miller* held was constitutionally mandated and the statute had not re-

ceived a prior authoritative construction reading the necessary terminology into the statute. In *Miller* (93 S.Ct. at 2614-2615), the Court stated:

> ". . . State statutes designed to regulate obscene materials must be *carefully limited.* See *Interstate Circuit, Inc. v. Dallas, supra,* 390 U.S. at 682-685 (1968). As a result, we now *confine* the permissible scope of such regulation to works which depict or describe sexual conduct. That *conduct must be specifically defined by the applicable state law, as written or authoritatively construed.*" (Emphasis added.)

Subsequently, the Court said (93 S.Ct. at 2616):

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. . . ."

The court below recognized that the statute under which petitioner was convicted utilized vague standards, saying: "On its face, this statutory terminology ['obscene, lewd, lascivious or filthy'] does not contain the specifics required by *Miller.* . . . *Miller* requires that elements of the definition be a part of the statute." *United States v. Thevis, Peachtree News Co., Inc.,* 484 F.2d at 1155. The court below concluded however that the statute's deficiency could be saved by an authoritative *retroactive* judicial construction. Thus, the court said: ". . . [I]n *12 200-Ft. Reels, supra,* at fn. 7, the Court states that it is 'prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of

that specific "hard-core" sexual conduct given as examples in *Miller*. . . .' We believe that this answers the question and that the definition of *Miller* is a gloss properly added to §1462. . . ." (484 F.2d at 1155.)

The lower court's reliance on *12 Reels of Film*, is, it is respectfully submitted, misplaced. When this Court stated that it was *prepared* to construe the vague terms "obscene, lewd, lascivious, filthy" in accordance with *Miller*, the Court made clear that prior to June 21, 1973, there had been no such authoritative construction. In *Louisiana v. Shreveport News Agency, Inc.*, ... La. S.Ct. .... (Supreme Court of Louisiana, No. 53-954, Dec. 3, 1973), the court refused to read *Miller* into the Louisiana obscenity statute retroactively. The Louisiana obscenity statute, like Section 1462, used the general terms "obscene, lewd, lascivious", etc. In concluding that the Louisiana state obscenity statute was unconstitutional because it did not contain a description of the specific sexual conduct an obscenity statute must contain if it is to meet constitutional requirements, Justice Barham, speaking for the court, said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however, to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .
>
> "In United States v. 12 200 Ft. Reels of Super 8 mm. Film . . . the Chief Justice . . . stated in

> Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific-hard-core' sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (Slip Opinion, 7-8.)

Even if the language in *12 Reels of Film* is more than pure *obiter dictum,* it certainly did not purport to have any retroactive effect. This Court has consistently held that the Judiciary is barred by the Due Process Clause from attempting to cure a vague statute by retroactive rulings, "either of the trial court or of the appellate court". The fundamental principle which requires a criminal offense to have existed when the conduct in issue occurred applies to bar "retroactive criminal prohibitions emanating from courts as well as from legislatures". *Bouie v. Columbia,* 378 U.S.347, 353, 354. See, also, *Douglas v. Bouder,* 93 S.Ct.2199.

B. Prior to June 21, 1973, Section 1462 was unconstitutionally vague, because the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent.

In *Miller,* the Court held that in a *state* obscenity prosecution, a *statewide standard* was sufficient to meet

constitutional requirements, and a national standard need not be applied. But in a federal obscenity case a national standard must be used, both because Congress so intended and because the Constitution probably requires it. See, *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 488.[4]

In *Miller*, Chief Justice Burger made it crystal clear that the federal and state standards were quite different by citing Justice Harlan's opinions in which he repeatedly argued for tight federal obscenity laws and looser state laws. (93 S.Ct. at 2620.)

This distinction was initially articulated by Mr. Justice Harlan dissenting in *Roth* and concurring in *Alberts*, 354 U.S. at 503-508. Justice Harlan there stated:

> ". . . [T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric."

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[4]The Court on June 21, 1973 was mute on the question of whether nationwide standards are still required in federal obscenity prosecutions. In *United States v. Orito* (93 S.Ct. at 2679), the Court incorporated the portion of *Miller* appearing in 93 S.Ct. at 2614-2615, and in *United States v. 12 Reels of Film* (93 S.Ct. at 2670, n. 7), the Court incorporated the portion of *Miller* appearing in 93 S.Ct. at 2615-2616. These page references relate solely to the kind of sexual conduct which might be reached under a valid obscenity statute. The discussion of local vs. national standards occurs at 93 S.Ct. at 2618-2620, where the Court said that state standards were constitutionally sufficient in a state prosecution.

Justice Harlan went on to state that not only is the federal interest in protecting the Nation against pornography attenuated, "but the dangers of federal censorship in this field are far greater than anything the States may do." Justice Harlan stated that he would judge a federal obscenity case against the background of "the attenuated federal interest in this field" and in view of the "very real danger of a deadening uniformity which can result from nationwide federal censorship."

Mr. Justice Harlan announced the opinion of the Court in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 487, wherein he observed that *"Roth's* evident purpose [was] to tighten obscenity standards". In discussing the relevant "community" in terms of whose standards of decency the issue of obscenity must be judged, Justice Harlan said: "We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." (370 U.S. at 488). In a footnote at the same page, Justice Harlan stated: "The 1958 amendments to 18 U.S.C. § 1461, 72 Stat. 962, 18 U.S.C.A. §1461, authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." See the testimony of Justice Rehnquist when he was Assistant Attorney General, Office of Legal Coun-

sel, Department of Justice, at *Hearings Before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Ninety-First Congress, on H.R. 5171, H.R. 11009, H.R. 11031, H.R. 11032, and related measures, Serial No. 21* (pp. 37-38, 46-47), where Justice Rehnquist expressed the view that a federal obscenity statute *had* to utilize national standards.

Mr. Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628, 2646, n. 7, addressed himself to the different standards applicable in state and federal cases, saying:

> "On the question of community standards see also *Hoyt v. Minnesota*, 399 U.S.524 . . . (Blackmun, J., joined by Burger, C.J., and Harlan, J., dissenting (flexibility for state standards); *Cain v. Kentucky*, 397 U.S.319 . . . (Burger, C.J., dissenting) (same); *Manual Enterprises v. Day*, 370 U.S.478 . . . (Harlan, J., joined by Stewart, J.) (national standards in context of federal prosecution)."

Once it is recognized that 18 U.S.C. Section 1462, as applied to petitioner herein, utilized a nationwide test, it becomes clear that the statute so applied is unconstitutionally vague. In *Miller*, the Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation." (93 S.Ct. at 2618). To structure an obscenity prosecution around evidence of na-

tional community standards "would be an exercise in futility" (93 S.Ct. at 2618). The Court found nothing in the First Amendment that requires a jury to consider "*unascertainable* 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (93 S.Ct. at 2619) (emphasis added). In *Miller*, the Court cited with approval Chief Justice Warren's observation in *Jacobellis v. Ohio*, 378 U.S. 184, 200, "that there is no provable 'national standard' . . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

Where, as here, 18 U.S.C. Section 1462 was construed and applied to make it a felony to transport in interstate commerce publications which allegedly were offensive to unascertainable and unprovable national standards, the statute is plainly impermissibly vague.[5]

C. Prior to June 21, 1973, Section 1462 was unconstitutionally vague, because it utilized an unworkable and ambiguous test—the "utterly without redeeming social value" test.

The court below stated that *Miller* did not "indicate" that *Memoirs* was unconstitutionally vague, but rather that the Court was dissatisfied with *Memoirs* "because it imposed greater burdens on the regulation of such

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[5]In *Miller*, 93 S.Ct. at 2614, the Court cited with approval *Interstate Circuit v. Dallas*, 390 U.S.676, where an obscenity ordinance was declared unconstitutionally vague. Chief Justice Burger's specific reference to *Interstate Circuit* was to 390 U.S. at 682-685, where the Court stated that because First Amendment rights were at stake "precision of regulation must be the touchstone". See also, *Grayned v. City of Rockford*, 408 U.S.104, 108-109; *Gooding v. Wilson*, 405 U.S.518; *Papachristou v. City of Jacksonville*, 405 U.S.156; *Ashton v. Kentucky*, 384 U.S.195; *Giaccio v. Pennsylvania*, 382 U.S.399; *Winters v. New York*, 333 U.S.507.

materials than was demanded by the Constitution" (484 F.2d at 1154). With all respect, petitioner suggests *Miller* did "indicate" that *Memoirs* was unconstitutionally vague. *Memoirs* was rejected precisely because of its unworkability—its vagueness. Chief Justice Burger spoke of the "intractable obscenity problem" (*Miller*, 93 S.Ct. at 2610). Quoting Justice Harlan, the Court wondered if the " 'utterly without redeeming social value' test had any meaning at all" (93 S.Ct. at 2613). The Court pointed to the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication" (93 S.Ct. at 2614). The *Memoirs* test, the Court said, has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation" (93 S.Ct. at 2614).

The court below asserted that the *Memoirs* test was not unconstitutionally vague because *Miller* stated that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law". (484 F.2d at 1154). What Chief Justice Burger had in fact stated in that regard was that *"a 'national' standard of First Amendment protection* enumerated by a plurality of this Court was correctly regarded at the time of trial as limiting state prosecution under controlling case law" (93 S.Ct. at 2618) (emphasis added). In stating that a national standard was required prior to June 21, 1973, the Chief Justice was not saying that the national standard test was sufficiently specific to meet the requirements of due process. On the contrary, Chief Justice Burger stated that there was no ascertainable national standard. A standard that is not ascertainable is plainly vague and, hence, unconstitutional.

D. Prior to June 21, 1973, Section 1462 was so vague, ambiguous and unworkable that this Court was required to adopt the *Redrup* approach of deciding each case on an *ad hoc* basis, without attempting to offer guidance to those subject to the provisions of the statute.

In *Miller,* Chief Justice Burger said that in view of the unworkability of the *Roth-Memoirs* test "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York,* 386 U.S.767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup 'policy'. See Walker v. Ohio,* 398 U.S. 434, 434-435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (93 S.Ct. at 2614, n.3).

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 93 S.Ct. at 2647, made the same point, saying: "In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York,* 386 U.S.767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court "resorted to the *Redrup* approach, which resolves cases

as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (93 S.Ct. at 2647).

Our Constitution, of course, requires fair notice so that the law-abiding can conform their conduct to the requirements of the law. But how was the petitioner, a law-abiding citizen, to know what publications dealing with sex would be found obscene by five of the Justices "subjectively judging" the publications "applying their separate tests"? If judges, attempting to follow this Court's lead conscientiously, "have often ended in hopeless confusion", was not petitioner's plight even more hopeless?

In *Grayned v. City of Rockford,* 408 U.S.104, 108-109, this Court said: "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

In the case at bar, petitioner, a law-abiding citizen, and an innocent man, has been trapped by being convicted under a statute which no man, not even the most learned Justice, can understand.

3. In light of this Court's decisions of June 21, 1973, the Indictment herein is fatally defective, be-

cause it failed to inform petitioner of the nature and cause of the accusation against him, in violation of the Sixth Amendment.

In *United States v. Orito,* 93 S.Ct.2674, 2679, this Court vacated the judgment of the district court and remanded the case "for reconsideration of the *sufficiency of the indictment* in light of *Miller v. California, supra; United States v. Twelve 200-Ft. Reels supra,* and this opinion." (Emphasis added.)

The necessity of examining the sufficiency of the indictment herein flows naturally from this Court's recognition that neither the words of the statute alone ("obscene, lewd, lascivious, filthy") nor the gloss put on these words by *Roth-Memoirs* gave sufficient notice of the offense charged. In the case at bar, the sole charge in the Indictment is that petitioner transported in interstate commerce by common carier "obscene, lewd, lascivious or filthy" publications. Petitioner duly moved to dismiss the Indictment because "it merely tracked the statutory language without specifying the elements constituting 'obscenity' ". *United States v. Thevis,* 484 F. 2d at 1151, 1152. The court below rejected petitioner's contention, invoking the general rule that: "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense. . . . The statute here does not omit any essential element of the offense for which [petitioners] have been convicted. The term 'obscene' as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth* and *Memoirs.*" (484 F.2d at 1152). The court below recognized that *Miller* "requires that regulatory statutes

define specific sexual conduct to whose depiction or description they apply" (484 F.2d at 1154), and that, on its face, the statutory terminology of §1462 "does not contain the specifics required by *Miller*" (484 F.2d at 1155). Nevertheless, the court concluded that the statutory deficiencies "can be satisfied by a judicial gloss" (484 F.2d at 1154, 1155) and that this subsequently imposed judicial gloss could appropriately be read into the Indictment retroactively.

Petitioner has no quarrel with the rule that an indictment which follows the language of a statute is *ordinarily* sufficient, unless the statute omits an essential element of the offense. It is petitioner's contention that Section 1462, standing alone, does omit an essential element of the offense and, therefore, the Indictment, which merely repeats the language of the defective statute, is insufficient. The court below concluded that this Court's definition of "obscenity" rendered in *Roth* and *Memoirs* had given the statutory language of Section 1462 such a clear and precise meaning that the term "obscene" was a "legal term of art" without ambiguity (484 F.2d at 1152). Nothing could be further from the truth.

In the decisions of June 21, 1973, the Court was unanimous on one point, and one point only—that the *Roth-Memoirs* test had failed to give adequate guidance as to what publications were criminal and what publications were unconditionally protected by the free speech and press provisions of the First Amendment. The *Roth-Memoirs* test was rejected as unworkable and unsupported by any member of the Court. The confusion surrounding this "legal term of art" was explored by the Fifth Circuit in *United States v. Groner*, both by the

panel (475 F.2d 550 [5 Cir. 1972]) and by the court en banc (479 F.2d 577 [5 Cir. 1973]). Judge Clark commented on the Court's failure to give "the respective limits of 'free press' rights under the First Amendment and unprotected publications which exploit sexuality," stating that "the judiciary has created a quagmire" (475 F.2d at 559). Judge Gewin, speaking for the majority of the en banc court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Supreme Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner*, Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth (joined by Judges Gewin, Bell, Coleman, Dyer, Clark, Ingraham and Ronney) recognized that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

In light of the Fifth Circuit's observation that "the judiciary has created a quagmire," and that *Roth-Memoirs*, pursuant to which petitioner was convicted, was "not the prevailing test," it is difficult for petitioner to understand what the court below meant when it stated that the term "obscene" is a "legal term of art", unless that court was thinking of abstract art. It is also difficult for petitioner to harmonize the statement

of the court below that Section 1462 "does not omit any essential element of the offense" (484 F.2d at 1152) with the court's recognition that on its face the statutory terminology of Section 1462 "does not contain the specifics required by *Miller* and that "*Miller* requires that elements of the definition be a part of the statute" (484 F.2d at 1155).

Russell v. United States, 369 U.S.749, is the leading case dealing with the sufficiency of an indictment in a federal prosecution. *Russell* holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute,* unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (369 U.S. at 765-766.) See also, *United States v. Carll,* 105 U.S.611, 612. In light of the tortured and unsuccessful efforts of this Court and other courts to define "obscene, lewd, lascivious and filthy", it must be conceded by all that those words, standing alone, fail to set forth "all the elements necessary to constitute the offense" intended to be punished by §1462. In *Russell,* the Court explored the purpose served by a grand jury indictment in the administration of federal criminal law, concluding that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation", and that "the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury had first intervened reflects centuries of antecedent development of common law" (369 U.S. at 761).

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene,

lewd, lascivious or filthy", the Indictment must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute." (369 U.S. at 765.) The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure. . . ." (369 U.S. at 765-766.) Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S.196, 201, 202." (369 U.S. at 766.)

This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under Section 1462. As the Court said

in *Russell:* "Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and the liberties of the individual. . . . [A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum. . . . [T]he repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve." (369 U.S. at 760.)

In *Russell,* the Court stated that at every stage in the criminal proceeding the accused "was met with a different theory, or by no theory at all. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." (369 U.S. at 769), and spoke of the difficulties and uncertainties which the federal trial and reviewing courts had in dealing with cases arising under the statute there involved. "Viewed in this context", the Court said the rule that an indictment must contain more than mere statutory language "is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." (369 U.S. at 769.) Federal trial

courts and reviewing courts have had even greater difficulties and uncertainties in dealing with cases arising under Section 1462.

In the case at bar, we have no clarifying bill of particulars. In any event, *Russell* teaches us that a bill of particulars cannot save an invalid indictment.

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (369 U.S. at 770.)

In *United States v. Vuitch*, 402 U.S.62, the trial court dismissed an indictment charging the commission of an abortion, on the ground that the statute was unconstitutionally vague. This Court reversed, concluding that the statute, properly construed, was not unconstitutionally vague. The Court stated however, that under the statute "the burden is on the prosecution to *plead and prove* that an abortion was not 'necessary for the preservation of the mother's life or health' ". (402 U.S. at 71.) (Emphasis added.)

In *Rabe v. Washington*, 405 U.S.313, the Court held that a state obscenity statute, construed as prohibiting the showing of a sexually oriented movie in a drive-in theatre, which movie might be exhibited to adults in an indoor theatre with impunity, was impermissibly vague for failure to give the accused fair notice that criminal liability was dependent upon the place where

the film was shown. Chief Justice Burger, joined by Justice Rehnquist, concurred, saying:

> ". . . That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but *the* state statute and *charge did not give the notice constitutionally required.*" (405 U.S. at 317.) (Emphasis added.)

Circuit and district courts have uniformly invalidated indictments containing ambiguities less gross than those found in the case at bar. See, *United States v. Leonard,* 455 F.2d 949, 950 (9 Cir. 1972); *United States v. Fiorito,* 465 F.2d 431, 432 (7 Cir. 1972); *Nelson v. United States,* 406 F.2d 1136 (10 Cir. 1969); *United States v. Beard,* 414 F.2d 1014 (3 Cir. 1969); *United States v. Little,* 317 F.Supp.1308 (D.C. Del. 1970); *United States v. Farinas,* 299 F.Supp.852 (D.C. N.Y. 1969); *United States v. Schneiderman,* 102 F.Supp.87 (D.C. Cal. 1951).

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of Section 1462, and the gloss put on that language by *Roth-Memoirs,* failed to give petitioner the constitutionally required notice. The Indictment, which merely repeated the defective statutory language was, therefore, fatally infirm.

4. The court below held that proof of knowledge or notice of the contents of alleged obscene material is sufficient to satisfy the *scienter* requirement in federal obscenity prosecutions. The issue raised by this ruling is one of substantial importance which has not been, but should be, decided by this Court.

In *Roth v. United States,* 354 U.S.476, the Court emphasized that the ambiguities of the standards for

judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth*, 354 U.S. at 491-492, and repeated in *Miller v. California*, 93 S.Ct. at 2617, n. 10.

In *Smith v. California*, 361 U.S.147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *scienter* in an obscenity prosecution. Justice Brennan, writing for the Court, stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[6]

In *Mishkin v. New York*, 383 U.S.502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some

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[6]Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its "obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161.) See, the opinion of Justice Harlan (361 U.S. at 170) and Justice Harlan's opinion for the majority in *Manual Enterprises, Inc. v. Day*, 370 U.S.478, 492-493, and fn. 16. See also, *New York Times Co. v. Sullivan*, 376 U.S.254, 278-279.

manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn. 9). Again the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity" (383 U.S. at 511).[7]

In *Redrup v. New York* and *Austin v. Kentucky*, 384 U.S.916, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene", the decision being made "without prejudice to the questions upon which review was originally granted." *Redrup v. New York* [*Austin v. Kentucky*], 386 U.S.767, 770. In his dissent, Justice Harlan noted that in *Smith v. California* a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined", and Justice Harlan expressed regret that the

[7]The indictment here did not allege petitioner's knowledge of the character of the magazines or specific intent to transport the alleged obscene publications, and the petitioner argued in the trial court, and in the court below, that this rendered the indictment constitutionally inadequate. See, *United States v. Orito*, 93 S.Ct. at 2676, n. 2.

Court had not "come to grips with such issues" (386 U.S. at 771-772).

One is not ordinarily guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Ignorance or mistake of fact negatives the existence of a *mens rea.* Moreover, mere proof of knowledge will not be sufficient unless such knowledge is accompanied by an intent to do the acts which constitute the harm against which the law is directed. Both knowledge and intent must exist before *scienter* can be deemed proven. Knowledge is the foundation of intent; without the knowledge the intent cannot exist. *United States v. Falcone,* 311 U.S.205. The ordinary criminal law also requires, in many cases, proof of a specific intent, that is, proof of an act done with a bad purpose. See, *Screws v. United States,* 325 U.S.91; *Dennis v. United States,* 341 U.S.494, 499.

Every obscenity prosecution implicates First Amendment questions, and therefore the standards for judging *scienter* in such prosecutions require more critical analysis than exist in the ordinary criminal case. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520. Stricter standards governing proof of *mens rea* and specific intent are required in the enforcement of statutes which affect the exercise of the freedoms of speech and press; this in order to avoid the constitutional infirmities which lurk in statutes involving First Amendment rights, and also to preserve the commu-

nity's right to know which may be seriously affected by the chilling effect and self-induced censorship engendered by laws and prosecutions thereunder which fail to provide exacting standards for judging *scienter*.

The court below, relying upon a decision of this Court rendered in 1896, held that mere proof of knowledge of "contents" of a publication was sufficient to establish the requisite *scienter* in an obscenity prosecution. The court declined to enunciate any other standard, disregarding decisions rendered by this Court in the Twentieth Century which cast a far different light on the importance of maintaining the rights guaranteed by the First Amendment against subtle erosions created by vague and ambiguous statutes and the elimination of strict *scienter* requirements. Thus the court below did not even require proof of an intent by an accused to commit a public wrong, or proof of knowledge of those operative facts which bring an obscenity statute into play, or proof of knowledge of the alleged obscenity of the material, or reckless disregard of whether or not the material was obscene. Yet such decisions of this Court as *Smith v. California*, *New York Times v. Sullivan* and the *Miller* quintet of decisions rendered on June 21, 1973, make it clear that mere proof of knowledge of the "contents" of a publication cannot be deemed the equivalent of proof of guilty knowledge under the laws and the Constitution.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "contents" of the material is to impose the absolute criminal liability condemned by this Court in *Smith v. California*. Sex and obscenity are not the same, and knowledge of the

"contents" of a publication dealing with sex cannot be the equivalent of knowledge of the obscenity of the publication. Mere proof that a publisher or distributor knew the contents of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts plainly fails to establish that such publisher or distributor knew the material was obscene. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S.577; *Weiner v. California,* 404 U.S.988; *Burgin v. South Carolina,* 404 U.S.806; *Hartstein v. Missouri,* 404 U.S.988.

It follows, therefore, that mere proof of "knowledge of contents" cannot be the standard for judging *scienter* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury or trial judge would be left free to presume guilty knowledge under the federal obscenity statute by their own subjective predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S.219; *Tot v. United States,* 319 U.S.463; *Speiser v. Randall,* 357 U.S.513. Such an arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material. *Smith v. California,* 361 U.S.147; *New York Times Co. v. Sullivan,* 376 U.S.254.

If an accused may be convicted without any proof that he knew that the material was obscene, and without

any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury becomes meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth*, through *Jacobellis, Memoirs, Ginzburg, Redrup, Stanley*, and the June 21 decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California*, 93 S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut*, 381 U.S.479; *Eisenstadt v. Baird*, 405 U.S.438; *Doe v. Bolton*, 93 S.Ct.739; *Roe v. Wade*, 93 S.Ct.705; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965); *In re Winship*, 397 U.S.358; *United States v. Vuitch*, 402 U.S.62; and *The Report of the Commission on Obscenity and Pornography*, September 1970.

It is submitted, therefore, that the judgment of conviction herein is constitutionally infirm because the standard for judging *scienter*, based solely on knowledge of the contents, does violence to the guarantees of the free speech and press and due process clauses of the First and Fifth Amendments. It should also be added that in the case herein, there was no competent evidence to establish knowledge of the contents of the

specific publications charged in the indictment on the part of the petitioner, Thevis.

5. The conduct alleged in the indictment occurred in April and May, 1970. The indictment was returned in May 1970; the trial was conducted in October and November 1970; and the finding of guilt was returned by the trial judge in June 1971. At the trial, the Government made no attempt to prove that the publications herein involved exceeded contemporary community standards in the Nation as a whole in the depiction or representation of sex, nor any attempt to prove that the material was utterly without redeeming social value or importance. The undisputed evidence establishes by competent evidence that the magazines do not offend national contemporary community standards and do have social value and importance.

The contention made by petitioner below that the Government had failed to establish beyond a reasonable doubt the essential elements of the offense charged in the indictment, and that the undisputed record made by petitioner establishes his innocence, was dismissed by the court below by the mere observation that: "Expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact." Petitioner submits that the court below misconceived the issue presented and reached a constitutionally impermissible result.

The trial in the case herein was conducted under the theory that the standards for judging the alleged obscenity of the publications were those enunciated by this Court in *Memoirs v. Massachusetts,* 383 U.S. 413, 418. Thus the obligation rested upon the prosecu-

tion to prove beyond a reasonable doubt three essential elements of the offense, to wit, that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value.

As this Court noted in *Miller* (93 S.Ct. at 2618-2620), a national standard of First Amendment protection limited both federal and state prosecutions under controlling case law at the time when the trial herein was conducted. In the area of federal prosecutions, it was recognized that the plain intent of Congress in the enactment of federal obscenity statutes was the requirement that the alleged obscenity of publications be measured by a national standard. This was the view of Justice Harlan from *Roth* through *Manual Enterprises, Inc. v. Day,* 370 U.S.478, 488, n. 10, and *Memoirs,* 383 U.S. at 458. In *Miller,* the Chief Justice, writing for the majority, noted the past opinions of Justice Harlan and the concurring views of Justice Blackmun on this issue. Moreover, under *Memoirs,* the prosecution, in order to prove obscenity, was required to affirmatively establish that the material was "utterly without redeeming social value." *Miller v. California,* 93 S.Ct. at 2613.

As heretofore stated, the Government made no attempt to prove the aforesaid essential elements of the offense. See, *In re Winship,* 397 U.S.358; and *Memoirs v. Massachusetts,* 383 U.S.413. Nevertheless, the petitioner here was convicted on the theory that the publications herein involved exceeded national standards and

were utterly without redeeming social value. This Court, however, described the national standard test as "unrealistic" and "an exercise in futility". The national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable", and "neither realistic nor constitutionally sound". 93 S.Ct. at 2618-2620. With respect to the "utterly without redeeming social value" test, this Court described the test as imposing a "burden virtually impossible to discharge under our criminal standards of proof". 93 S.Ct. at 2613.

In short, the petitioner here was convicted without proof of the essential elements of the offense and under standards which this Court has held are unconstitutional and virtually impossible to establish. To convict an accused without proof of guilt and under palpably unconstitutional and unlawful standards is to deprive the accused arbitrarily and capriciously of his liberty without the slightest semblance of due process of law. *Thompson v. City of Louisville,* 362 U.S.199; *Tot v. United States,* 319 U.S.463; *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S.196; *Rabe v. Washington,* 405 U.S.313; *In re Winship,* 397 U.S.358.

6. The publications here were entitled to constitutional protection when the alleged offenses occurred and at the time the judgment of conviction was rendered. The publications were entitled to constitutional protection under the prior decisions of this Court and, indeed, the decisions of this Court rendered on June 21, 1973 support this conclusion. As the decision of the trial judge makes clear, the Government never contended that the material here could be described as "hard core pornography" and the trial judge made no such finding. The trial judge also made it clear in his

opinion that no issue of pandering or distribution to juveniles, or offense to public sensibilities, was at all involved in the case herein. The publications herein are less candid than those that were held entitled to constitutional protection in such cases as *Wiener v. California,* 404 U.S.988; *Burgin v. South Carolina,* 404 U.S.806; and *Hartstein v. Missouri,* 404 U.S.988.

As heretofore discussed, if under the *Memoirs* standards, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment." (93 S.Ct. at 2614, n. 3), then it is respectfully submitted the petitioner could not be fairly charged with knowing that the publications herein were without constitutional protection in the light of the multifold rulings made by the Court with respect to comparable material.

The publications herein involved, on the undisputed record and under the governing controlling law, were not obscene and were entitled to constitutional protection.

7. The court below concluded that six of the publications herein offended both the *Memoirs* and *Miller* standards (June 21, 1973), and adjudged that the convictions on the counts of the indictment relative to such publications could be upheld. Such ruling offends not only the free speech and press and due process guarantees of the constitution, but the principles of fair notice and protection of an accused from retroactive application of unforeseeable judicial statutory construction.

Insofar as the *Memoirs* standards are concerned, as hereinbefore discussed, none of the publications are ob-

scene. None of the publications contain explicit sexual depictions or representations, and all are comparable to material found constitutionally protected by this Court.

Insofar as the *Miller* standards are concerned, petitioner's conviction has been affirmed under a statute with a meaning quite different from the one he was charged with violating. The statute as construed is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability was dependent upon the unknown specified sexual conduct, or upon some standards other than national, or upon a standard other than "utterly without redeeming social value." *Rabe v. Washington,* 405 U.S.313. The petitioner was charged and tried solely under an unworkable national standard. There never was any charge or proof in the case herein that the publications offended some local standard. It has been repeatedly held by this Court that conviction upon a charge not made, or upon a theory not tried, is a sheer denial of due process of law. *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196.

Furthermore, the court below manifestly read into the law conduct not previously proscribed and which, in addition, altered the legal rules of evidence, permitting less and different testimony than the law required at the time of the commission of the alleged offense. See *Bouie v. Columbia,* 378 U.S.347. This Court recently stated, in *Douglas v. Buder,* 93 S.Ct. 2199, 2200-2201:

> ". . . We held in Bouie that '[w]hen . . . [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the ef-

fect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."

The action of the court below is tantamount to an amendment of the indictment herein, contrary to constitutional commands. The indictment so amended would no longer be the accusation made by the Grand Jury which returned it. *Ex Parte Bain,* 121 U.S.1, 10, 13.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion and Judgment of the Court of Appeals.

United States of America, Plaintiff-Appellee, v. Michael G. Thevis and Peachtree News Company, Inc., Defendants-Appellants. No. 71-2614.

United States Court of Appeals, Fifth Circuit. Sept. 12, 1973.

Before JOHN R. BROWN, Chief Judge, and BELL and SIMPSON, Circuit Judges.

BELL, Circuit Judge:

Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 U.S.C.A. §1462.[1] Jury trial was waived. The subject matter of each count was a particular magazine and appellants were convicted on each of the counts. The district court, 329 F.Supp. 265, found that the material in question, i.e., each magazine, was obscene under the three-pronged test of *Memoirs*.[2] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be

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[1]18 U.S.C.A. § 1462 (1966):

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense.

[2]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. Redrup v. New York, 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing that they were obscene in the constitutional sense; (4) that 18 U.S.C.A. § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient to support the lower court's finding on the issue of obscenity vel non. We will treat these two elements as separate assignments of error.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First

Amendment. Miller v. California, 1973, ... U.S. ...., ..., 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, 432; Paris Adult Theatre I v. Slaton, 1973, ... U.S. ...., 93 S.Ct. 2628, 37 L.Ed.2d 446; United States v. Orito, 1973, ... U.S. ...., 93 S.Ct. 2674, 37 L.Ed.2d 513; Kaplan v. California, 1973, ... U.S. ...., 93 S.Ct. 2680, 37 L. Ed.2d 492; United States v. 12 200-Ft. Reels of Super 8 mm. Film, 1973, ... U.S. ...., 93 S.Ct. 2665, 37 L. Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of the new standard would be violative of the Ex Post Facto Clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 U.S.C.A. §1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller*, that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to test the materials for obscenity under any standard. We reject this broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We reserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

[1] Appellants' first assignment of error is that the materials in question should not be tested under a standard as restrictive of pornography[3] as *Memoirs*. Rather they urge a standard arguably suggested in Redrup v. New York, supra, requiring for a finding of obscenity that the materials be distributed to nonconsenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*, ... U.S. at ...., 93 S. Ct. at 2618, 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such a marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Fi-

[3] "Pornography" derives from the Greek (*porne*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as a writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

nally, we note that the origin of the "pandering" concept is Ginzburg v. United States, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467-476, 86 S.Ct. 942.

[2] Appellants' second argument is that the indictment, which tracked the wording of 18 U.S.C.A. § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; Downing v. United States, 5 Cir. 1965, 348 F.2d 594, 599. See also Esperti v. United States, 5 Cir., 1969, 406 F.2d 148; Bland v. United States, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*. Further, in *Roth* the Court held that the words used in 18 U.S.C.A. § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

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[4]Roth v. United States, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

[5]The sufficiency of an indictment tracking the words of 18 U.S.C.A. § 1462 was challenged in United States v. Luros, N.D.

(This footnote is continued on next page)

[3] Appellants' third contention deals with the scienter necessary for conviction under 18 U.S.C.A. § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on Smith v. California, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in Rosen v. United States, 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: United States v. West Coast News Company, 6 Cir., 1966, 357 F.2d 855, rev'd on other grounds, Aday v. United States, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; Schindler v. United States, 9 Cir., 1953, 208 F.2d 289. See also Kahm v. United States, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

Iowa, 1965, 243 F.Supp. 160, rev'd on other grounds, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-167.

[4] The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from Stanley v. Georgia, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by United States v. Thirty-Seven Photographs, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and United States v. Reidel, 1971, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by United States v. Orito, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

[5] The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in United States v. Groner, 1973, 479 F.2d 577 (En banc), that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in Paris Adult Theatre I v. Slaton, supra, ... U.S. at ....., 9 S.Ct. at 2634, 37 L.Ed.2d at 456. See also Kaplan v. California, supra, ... U.S. at ....., 93 S.Ct. at 2684, 37 L.Ed.2d at 498.

II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

"(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," (citations omitted)

"(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

"(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito*, supra, and *12 200-Ft. Reels*, supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment incursions, the *Miller* standard requires that regulatory statutes define specific sexual conduct to whose depiction or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 U.S.C.A. § 1462 are subject to such construction.

See *12 200-Ft. Reels*, supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,[6] the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of Kaplan v. California, supra (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

[6] We decline to read so much into *Miller*. Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be reexamined in light of its clarification of previous standards and its declaration of new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ..... U.S. at ....., 93 S.Ct. at 2618, 37 L.Ed. 2d at 435.

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[6]Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs*, because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller*, ... U.S. at ....., 93 S.Ct. at 2613, 37 L.Ed.2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.*, at ...., 93 S.Ct. at 2619, 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller*. Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir., 1973, supra, we

shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by Miller v. United States, 1973, ... U.S. ....., 93 S.Ct. 3030, 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See Miller v. United States, 9 Cir., 1970, 431 F.2d 655.

[7] Therefore, before we consider the question of obscenity *vel non*, and because we do apply the *Miller* standard, we must address ourselves to the question whether 18 U.S.C.A. § 1462 can satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd,

[7]We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

lascivious, or filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12 200-Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hardcore' sexual conduct given as examples in *Miller*. . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under Jacobellis v. Ohio, supra, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

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[8]These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, execretary functions, and lewd exhibitions of the genitals." *Miller*, ... U.S. at ...., 93 S.Ct. at 2615, 37 L.Ed.2d at 431.

TABLE I

	Memoirs			*Miller*		
	(a)	*(b)*	*(c)*	*(a)*	*(b)*	*(c)*
Magazine Titles	*Dominant theme, taken as a whole, appeals to a prurient interest in sex*	*Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters*	*Utterly without redeeming social value*	*The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest*	*Patently offensive depiction or description of sexual conduct specifically defined by applicable statute*	*Taken as a whole, lacks serious literary, artistic, political or scientific value*
Boys and Their Male Lovers	Yes	Yes	No	Yes	Yes	Yes
Duo	Yes	Yes	Yes	Yes	Yes	Yes
Domino	Yes	Yes	Yes	Yes	Yes	Yes
Love Knot	Yes	Yes	Yes	Yes	Yes	Yes
Wanton	Yes	Yes	Yes	Yes	Yes	Yes
My Boys	Yes	Yes	Yes	Yes	Yes	Yes
In & Its Nice	Yes	Yes	Yes	Yes	Yes	Yes
Girlfriends	Yes	Yes	No	Yes	Yes	Yes
Pussy Willow	Yes	Yes	No	Yes	Yes	Yes
Arcadia	Yes	Yes	No	Yes	Yes	Yes
Teenage Jaybirds	Yes	Yes	No	Yes	Yes	Yes
Cloud 9	Yes	Yes	No	Yes	Yes	Yes

[8] In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter. Indeed, the pictures in each instance are the principle content of the magazines and would, standing alone, be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

Affirmed in part; reversed in part.

APPENDIX B.

Opinion and Order of District Court.

United States of America v. Michael G. Thevis and Peachtree News Company, Inc. No. 70-72-Cr-J.

United States District Court, M. D. Florida, Jacksonville Division. June 25, 1971.

MEMORANDUM OPINION AND ORDER

FISHER, District Judge.

The Defendants, Michael G. Thevis and Peachtree News Company, Inc., entered a plea of not guilty to a twelve-count indictment charging them with violations of a Federal Obscenity Statute, to wit, Title 18, U.S.C., Section 1462.[1] Count One of the indictment charges, "* * * that the Defendants, Michael G. Thevis and Peachtree News Company, Inc., did wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 38 copies of magazines entitled "Duo," from Atlanta, State of Georgia, to Springfield News Company, Jacksonville, Florida." The remaining eleven counts of the indictment are identical to Count One with the exception of the alleged obscene material, to wit, Count Two, 10 copies of magazines entitled "Boys and Their Male

[1] "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character * * *" shall be guilty of an offense against the laws of the United States.

Lovers;" Count Three, 20 copies of magazines entitled "Domino;" Count Four, 5 copies of magazines entitled "Love Knot;" Count Five, 5 copies of magazines entitled "Wanton;" Count Six, 110 copies of magazines entitled "My Boys;" Count Seven, 5 copies of magazines entitled "In and Its Nice;" Count Eight, 6 copies of magazines entitled "The Girlfriends;" Count Nine, 10 copies of magazines entitled "Pussy Willow;" Count Ten, 10 copies of magazines entitled "Arcadia;" Count Eleven, 10 copies of magazines entitled "Teenage Jaybird;" and Count Twelve, 10 copies of magazines entitled "Cloud 9."

The offenses described in Counts One through Seven are alleged to have occurred April 24, 1970, and the offenses described in Counts Eight through Twelve are alleged to have occurred May 6, 1970.

Pre-trial motions challenging the sufficiency of the indictment and requesting a stay of proceedings were denied by the trial court and the Supreme Court. The Government and the Defendants executed and filed Waivers of a Jury Trial and entered into Stipulations of Fact, and the case proceeded to trial by the Court sitting without a jury. After the conclusion of the evidence, oral arguments were heard and the Court took the case under advisement, allowing counsel for the Government and the Defendants to file written briefs.

Although the Defendants entered a plea of not guilty to each of the twelve counts of the indictment, insisting that the Government meet its burden of proof in adducing evidence beyond a reasonable doubt to each and every element of the alleged offense, no serious contest was made of the fact that the material was transported in interstate commerce on or about the dates al-

leged in the indictment and that both of the Defendants, Michael G. Thevis and Peachtree News Company, Inc., had knowledge of the contents of the magazines and knowledge of the interstate shipment.

The Defendants contend that the publications contain primarily pictures of either males with males, or females with females, or males with females at the most engaged in simulated activity involving primarily psuedo foreplay. Therefore, their argument continues, said magazines cannot be considered obscene in the constitutional sense and are entitled to First Amendment protection absent the actual depiction of sexual acts where no imagination is required to see the act in progress, such as that which shows insertion or genital travel in the actual act of intercourse or sodomy, or actual acts of cunnilingus or fellatio, in other words, "hard-core pornography;" Defendants further contend that if in fact, there is any redeeming social value in the materials, they may not be proscribed; and further, if the materials are disseminated to willing adults in an adults-only environment and are not disseminated to juveniles or pandered or foisted upon an individual wishing to avoid confrontation with them, the materials may not be proscribed.

The Government, on the other hand, contends that the publications in question contain either males with males, or females with females, or males with females depicting simulated acts of intercourse or other sexual acts in such a manner as to be held obscene under the basic test first pronounced in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and later elaborated upon by A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v.

Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966), where the Supreme Court stated the requirements to be as follows:

> " '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' * * * Under this definition as elaborated in subsequent cases, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The issue for the Court to determine is whether or not the material in the magazines in question is obscene. In this regard, there is absolutely no possibility for doubt that the material in the twelve types of magazines depicts pornography in its gross, most vulgar and offensive form, but, for the Defendants to be found guilty of the offenses alleged in the indictment, the Court must find the magazines to be obscene in a constitutional sense, and therefore not entitled to First Amendment protection.

Our task has been made considerably easier by the Supreme Court's recent opinions in United States v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971) and United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). In *Reidel,* the Court declared that the First Amendment is not violated by the application of

Section 1461 of Title 18, U.S.C., which forbids the use of the mails to deliver obscene matter, to the distribution of obscene material to willing recipients who state that they are adults. Likewise, in *Thirty-Seven Photographs*, the Court held that the First Amendment is not violated by the application of Title 19, U.S.C., Section 1305(a), which authorizes the Government to seize at the port of entry into the United States obscene matter privately possessed by a person who intends it for commercial distribution.

In the years between *Roth* in 1957 and *Reidel* and *Thirty-Seven Photographs* in 1971, certain Supreme Court decisions seemed to narrow the permissible scope of regulation of allegedly obscene material. See Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966); Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967); Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). Under these decisions and others, Carlos v. New York, 396 U.S. 119, 90 S.Ct. 395, 24 L.Ed.2d 303 (1969); Cain v. Kentucky, 397 U.S. 319, 90 S.Ct. 1110, 25 L.Ed.2d 335 (1970); Bloss v. Dykema, 398 U.S. 278, 90 S.Ct. 1727, 26 L. Ed.2d 230 (1970); Walker v. Ohio, 398 U.S. 434, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970); Hoyt v. Minnesota, 399 U.S. 524, 90 S.Ct. 2241, 26 L.Ed.2d 782 (1970); Bloss v. Michigan, 402 U.S. 938, 91 S.Ct. 1615, 29 L.Ed.2d 106 (1971),[2] it would appear that a new doctrine of First Amendment protection had evolved, and it would not be accurate to state cate-

[2]These are all cases involving state convictions reversed per curiam without opinions citing *Redrup*.

gorically that the First Amendment did not protect obscenity.

In *Jacobellis*, the Court reversed a conviction under a state statute for the exhibition of an obscene motion picture. The Court reiterated the standard that a work cannot be proscribed unless it is "utterly without redeeming social importance," and hence material that deals with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be held obscene and denied constitutional protection.

In *Ginzburg*, defendant was convicted of violating the federal obscenity statute by mailing three publications that dealt exclusively with sex. Besides testimony as to the merit of the material, abundant evidence was introduced that each of the publications was originated or sold as stock in trade of the business of pandering, i.e., the purveying of publications openly advertised to appeal to the customers' erotic interest. The Supreme Court affirmed the conviction, holding that the defendant had deliberately represented the publications as erotically arousing and had commercially exploited them as erotica solely for the sake of prurient appeal. In other words, the gravamen of the offense was "pandering."

In *Redrup*, the Court handed down a decision in which it found specific books and magazines not "obscene in the constitutional sense" under the three criteria stated in *Roth* and *Memoirs*. The real significance of the opinion, however, is the Court's dictum that certain publications are not protected by the First Amendment. The Court went on to say that if objectionable material is "pandered," "obtrusively" adver-

tised, or placed in an environment in which it is likely to fall into the hands of children, it can be constitutionally suppressed.

Subsequent to *Redrup*, the Supreme Court considered the issue of obscenity from a somewhat different viewpoint in Stanley v. Georgia. There, pornographic films were found in Stanley's home, and he was convicted under Georgia statutes for possessing obscene material. The Court concluded that the state has no legitimate interest in controlling what an adult reads in the privacy of his home and that the mere private possession of obscene matter cannot constitutionally be made a crime. But the Court neither overruled nor disturbed the holding in *Roth*, using the following language in *Stanley* at page 568, 89 S.Ct. at page 1749:

> "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home * * *"

Since *Stanley*, a few of the lower courts have construed the decision narrowly but apparently correctly, holding that an individual only has a right to possess obscene material in the privacy of his home. United States v. Melvin, 419 F.2d 136 (4th Cir. 1969); United States v. Fragus, 422 F.2d 1244 (5th Cir. 1970), supplementing its earlier opinion June 23, 1970 (No. 27801); Gable v. Jenkins, 309 F.Supp. 998 (N.D. Ga. 1969) (three-judge court), aff'd 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970). However, a considerable number of the lower courts have given Stanley a broader interpretation, holding that if the

Government has no interest in preventing a citizen from reading books and watching films in the privacy of his home, then it can have no interest in preventing him from acquiring obscene material. United States v. B & H Dist. Corp., 319 F.Supp. 1231 (W.D.Wis. 1970), vacated and remanded, 403 U.S. 927, 91 S.Ct. 2248, 29 L.Ed.2d 705 (1971); United States v. Orito, No. 70-CR-20 (E.D.Wis. Oct. 28, 1970), appeal docketed 39 U.S.L.W. 3333 (No. 1276 Jan. 26, 1971); Stein v. Batchelor, 300 F.Supp. 602 (N.D.Tex. 1969), vacated and remanded on proced. grds. sub nom. Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971); Karalexis v. Byrne, 306 F.Supp. 1363 (D. Mass. (1969), vacated and remanded on proced. grds. 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971); United States v. Lethe, 312 F.Supp. 421 (E.D.Cal. 1970); Childs v. Oregon,[3] 300 F.Supp. 649 (D.C. 1969), rev'd 431 F.2d 272 (9th Cir. 1970), rev'd 401 U.S. 1006, 91 S.Ct. 1248, 28 L.Ed.2d 542 (1971); United States v. 35 M.M. Motion Picture Film,[4] 312 F.Supp. 1382 (S.D.N.Y.), rev'd 432 F.2d 705 (2nd

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[3]In *Childs*, the lower court found the material not obscene and not so obtrusive as to force it upon an unwilling individual. The Appellate Court reversed this decision and found the material obscene. This decision was reversed by the Supreme Court on the basis of *Redrup*.

[4]In *35 M.M. Motion Picture Film*, the lower court found the material obscene and an offensive affront to community standards. The Appellate Court reversed the decision and found the material not obscene. However, the higher court did state that its holding was based on adult standards and that it was possible that a prosecution might succeed under a statute showing concern for juveniles. The Government's Motion to Dismiss based on *Thirty-Seven Photographs* was granted.

Cir. 1970), writ dismissed on other grds. United States v. Unicorn Enterprises, Inc., 403 U.S. 925, 91 S.Ct. 2241, 29 L.Ed.2d 704 (June 15, 1971); United States v. Reidel, Crim. No. 5845 (C.D.Cal. 1970) (three-judge court).

As best we can read the obscenity decisions, the Supreme Court has never specifically held, the nearest thing being the dictum in *Redrup,* that obscene material may receive First Amendment protection unless such material is disseminated to unconsenting adults and children or is pandered. On the other hand, many of the lower courts have specifically held that before objectionable material can be constitutionally suppressed, it must be pandered, obtrusively disseminated, or placed in an environment in which it is likely to fall into the hands of children. Poulos v. Rucker, 288 F.Supp. 305 (N.D.Ala. 1968); United States v. 77 Cartons of Magazines, 300 F.Supp. 851 (N.D.Cal. 1969); United States v. Barnaov, 293 F.Supp. 610 (D.C.) rev'd 418 F.2d 1051 (9th Cir. 1969); Childs v. Oregon, *supra*; United States v. 35 M.M. Motion Picture Film, *supra*; United States v. Thirty-Seven (37) Photographs, 309 F.Supp. 36 (C.D.Cal. 1970) (three-judge court); United States v. Reidel, *supra.* However, there is one recent Ninth Circuit Court of Appeals case, Miller v. United States, 431 F.2d 655 (1970), which not only held the distribution of the obscene material to be "pandering," but also held that the indiscriminate and wholesale distribution of the obscene material with reckless disregard of the identity and age

of the recipient was a violation of Title 18, U.S.C., Sections 1461 and 1462.

Since the evidence in our case does not involve obtrusive dissemination or an environment in which the material is likely to fall into the hands of juveniles, and the magazines in question were not pandered, in following the decisions based on *Redrup*, we might be expected to find the Defendants not constitutionally guilty of interstate transportation of obscene material. But *Reidel* and *Thirty-Seven (37) Photographs* have now clarified beyond question that obscene material regardless of how or to whom disseminated is not within the scope of First Amendment protection. *Roth* has been reaffirmed with all of its original vitality. In *Reidel*, Justice White said: "*Roth* has not been overruled. It remains the law in this Court and governs this case." Similarly, in *Thirty-Seven (37) Photographs*, he said: "As we held in Roth v. United States * * * obscenity is not within the scope of first amendment protection." Further, in discussing the District Court opinion in *Reidel*, and the application of the *Stanley* decision, Justice White observed:

> "The District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision. Relying on the statement in *Stanley* that 'the Constitution protects the right to receive information and ideas * * * regardless of their social worth,' 394 U.S., at 564, 89 S.Ct. at 1247, the trial judge reasoned that 'if a person has the right to receive and possess this material, then someone

must have the right to deliver it to him.' He concluded that Sec. 1461 could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults. * * *'

"The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth,* the precise result that the *Stanley* opinion abjured. Whatever the scope of the 'right to receive' referred to in *Stanley,* it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings which *Roth* held unprotected by the First Amendment."

Reidel, at 4 and 5.

We can now say for certain that obscenity need not involve the three enumerated areas, i.e., "pandering" or "dissemination to unconsenting adults or children," in order for it to be proscribed and constitutionally suppressed. Therefore, under the facts of our case, we find that the magazines in question are obscene and that the Defendants are not protected by the First Amendment. The evidence adduced clearly proves beyond a reasonable doubt that the male and female homosexual material appeals to the prurient interest in sex of these clearly defined deviant groups; further, that the female with male publications appeal to a prurient interest in sex of an average person of the community. Second,

the Court finds that the magazines involved in each of the twelve counts are patently offensive because they offend beyond a reasonable doubt contemporary community standards as well as national standards relative to sexual matters; third, the Court finds beyond a reasonable doubt that said magazines named in each of the twelve counts are utterly without redeeming social value; and finally, the Court finds beyond a reasonable doubt that the Defendants wilfully and knowingly caused the magazines described in each of the twelve counts to be transported in interstate commerce by common carriers.

Therefore, it is ordered and adjudged that the Defendants, Michael G. Thevis and Peachtree News Company, Inc., are guilty of the charges contained in each of the twelve counts of the indictment, and each of the Defendants is instructed to appear before the Court for the purpose of being sentenced.

APPENDIX C.

Order of Court of Appeals Denying Petitions for Rehearing.

In the United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff-Appellee, versus Michael G. Thevis and Peachtree News Company, Inc., Defendants-Appellants. No. 71-2614.

Appeal from the United States District Court for the Middle District of Florida.

On Petitions for Rehearing and Petitions for Rehearing En Banc. (Opinion Sept. 12, 1973, 5 Cir., 1973, ... F.2d .....).

(November 15, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX D.

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

4. The pertinent provisions of Article I, §9 are:

"* * * No . . . ex post facto Law shall be passed. * * *"

5. The pertinent provisions of 18 U.S.C. §1462 are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) an obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or * * *

"Whoever knowingly takes from such express company or other common carrier any matter or

thing the carriage of which is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter." (June 25, 1948, c. 645, 62 Stat. 768; May 27, 1950, c. 214, §1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85-796, §2, 72 Stat. 962.)

APPENDIX E.

Opinion of the Court of Appeals for the Ninth Circuit (Henson).

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Thomas Venest Henson aka Tom Vinnie Henson, George Victor Abisalih aka George Abbey, dba "Associated Theaters of Texas", Appellants. No. 73-2063.

Filed: Oct. 5, 1973.

Appeal from the United States District Court for the Central District of California.

Before: ELY and GOODWIN, Circuit Judges, and MURRAY, District Judge.*

PER CURIAM:

In an indictment consisting of two counts and filed on January 10, 1973, the appellants were charged with having transported obscene material in interstate commerce, a violation of 18 U.S.C. § 1462. Their trial before a jury commenced on March 13, 1973, and was concluded on April 2, 1973, when the jury returned verdicts of guilty as to each appellant on both counts of the indictment. In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383

*Honorable William D. Murray, Senior United States District Judge, Butte, Montana, sitting by designation.

U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.

In the light of the Supreme Court's decisions of June 21, 1973, hereinafter cited, the judgments of conviction must be, and they hereby are, vacated. The cause is remanded to the District Court for reconsideration in the light of *Miller v. California*, ... U.S. ...., 41 U.S.L.W. 4925 (June 21, 1973); *Paris Adult Theatres I v. Slaton*, ... U.S. ...., 41 U.S.L.W. 4935 (June 21, 1973); *United States v. Orito*, ... U.S. ...., 41 U.S.L.W. 4956 (June 21, 1973); *Kaplan v. State of California*, ... U.S. ...., 41 U.S.L.W. 4958 (June 21, 1973); *United States v. 12 200-Ft. Reels of Super 8 mm Film*, ... U.S. ...., 41 U.S.L.W. 4961 (June 21, 1973). *See Stroud v. State*, ... Ind. ...., 300 N.E. 2d 100 (Aug. 21, 1973); *Mohney v. State*, ... Ind. ...., 300 N.E. 2d 66 (Aug. 21, 1973).

SO ORDERED.

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United States Circuit Judges

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United States District Judge

APPENDIX F.

Opinion of the Court of Appeals for the Tenth Circuit (Friedman).

United States of America, Appellee, v. Melvin Friedman and Peachtree National Distributors, Inc., Appellants.

United States Court of Appeals, Tenth Circuit.

Filed: December 11, 1973.

Nos. 72-1143-44—November 1973 Term.

Appeal From the United States District Court for the Western District of Oklahoma (D.C. # CR-71-223). Robert Eugene Smith, Atlanta, Georgia (Gilbert H. Deitch, Chattanooga, Tennessee, Don Manners, William R. Cathcart, and Jim Merz, of Counsel Oklahoma City, Oklahoma, with him on the Brief), for Appellants.

William R. Burkett, United States Attorney, for Appellee.

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

Melvin Friedman and Peachtree National Distributors, Inc. appeal from their convictions and sentences for violation of 18 U.S.C. § 1465(2) after a trial to a jury in the United States District Court for the Western District of Oklahoma.

It is our view that the several recent decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. *See* Miller v. California, ... U.S. .... (1973), 41 U.S.L.W. 4925

(June 21, 1973); United States v. Orito, ... U.S. .... (1973), 41 U.S.L.W. 4956 (June 21, 1973); United States v. 12 200-Ft. Reels of Super 8 mm. Film, ... U.S. .... (1973), 41 U.S.L.W. 4961 (June 21, 1973).

These decisions, in our opinion, require a reexamination of the facts of this case together with the determination of what may be the applicable standards. We are not unmindful of the decisions of other circuits which hold that remand is not necessary. We are not prepared to hold or assume that in all instances the national standards are more lenient than all local standards. Further there are substantial unresolved questions as to the nature of the proof now required.

The decisions cited above include cases arising under state law and under federal law. The Court did not express itself directly on the application of "community standards" to trials under the federal statute as compared to its statement as to the state laws in Miller. *See*, however, United States v. 12 200-Ft. Reels, Slip Opinion at 7, and the reference therein to "these" standards. 12 200-Ft. Reels upheld an attack on the constitutionality of 19 U.S.C. § 1350(a), and the Court related the tests under that section to the examples in Miller. In United States v. One Reel of Film, 481 F.2d 206, the First Circuit considered a post-Miller forfeiture case also under 19 U.S.C. § 1305 as to a film seized upon entry into the country. The court there applied national standards to the seizure apparently for the very practical reasons expressed in the concurring opinion.

A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be. *See also* United States v. Ewing, ...

F.2d .... (Tenth Circuit, No. 638-70), opinion after remand to this court.

Although it is clear that venue in this case was properly laid in the Western District of Oklahoma, 18 U.S.C. §§ 1465, 3237(a); *see* Swisher v. Moseley, 442 F.2d 1331 (10th Cir.); United States v. Luros, 243 F. Supp. 160 (N.D.Iowa), *rev'd on substantive grounds, sub nom.* Luros v. United States. 389 F.2d 200 (8th Cir.); *cf.* Gold v. United States, 378 F.2d 588 (9th Cir.); United States v. Ross, 205 F.2d 619 (10th Cir.), we query why the case was brought in that district as opposed to another. Considerations of *forum non conveniens* and the interests of justice, *see* Fed.R.Crim.P. 21(b), and the principles enunciated in United States v. Luros, 243 F.Supp. 160 (N.D.Iowa), would appear to be applicable to such cases as this where a national distributor of "literature" distributes its material throughout the nation. *See* Jones v. Gasch, 404 F.2d 1231 (D.C.Cir.) (opinion and dissent). We of course express no view on this matter but merely raise the question. It is apparent that this problem will be of increasing importance in cases of this nature in the future.

Accordingly, the judgments of conviction are hereby vacated and the cause is remanded to the district court for a new trial.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1075

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING.

Petitioner Michael G. Thevis respectfully presents this petition for a rehearing and prays the Court for an order vacating its denial of the petition for writ of certiorari entered on July 25, 1974, and granting the petition. The petition for rehearing is confined to substantial grounds available to petitioner, although not previously presented, and to intervening circumstances of substantial and controlling effect.

1. In *Hamling v. United States*, No. 73-507, the majority opinion acknowledged that the instructions by the district court with respect to the community standards of the "country as a whole" delineated a wider geographic area than would be warranted by the decisions of the Court in *Miller* and *12 200-Ft. Reels of*

Film and the new standard enunciated in *Hamling* itself. In short, the Court held that one of the criteria for judging obscenity was "local community standards". In *Hamling*, the Court acknowledged that error had occurred, but that petitioners in *Hamling* were not "materially prejudiced" by the district court's failure to give appropriate instructions (Slip Op. 17). The majority opinion concluded, upon an examination of the particular record, that failure to give the correct instructions would not have "materially affected" the deliberations of the jury. Such a conclusion, it is submitted, cannot be reached on the record here.

The trier of the facts in the case herein was a judge of the district court, the Honorable Joe J. Fisher, a jury trial having been waived. The memorandum opinion and order adjudging petitioner guilty (Petition for cert., Appendix B) specifically stated: "Since the evidence in our case does not involve obtrusive dissemination or an environment in which the material is likely to fall into the hands of juveniles, and the magazines in question were not pandered, in following the decisions based on *Redrup*, we might be expected to find the Defendants not constitutionally guilty of interstate transportation of obscene material." (App. B, p. 24). The government never contended that the material here could be described as "hard core pornography", and the trial judge made no such finding.

The Honorable Joe J. Fisher, aforesaid, was a visiting judge from the United States District Court, Eastern District of Texas. Whatever the said district judge may have known with respect to the "local community standards" of Beaumont, Texas, there is nothing in the record here to indicate that the said judge was at all familiar with or had any knowledge of the local

community standards of Jacksonville, Florida, where the trial took place. Moreover, the case herein was tried from beginning to end on only one theory, and that is that the publications here involved violated solely the national standards. Judge Fisher was meticulous in his memorandum opinion (Petition for cert., App. B, pp. 15-26) in emphasizing that he was following the standards and criteria prescribed in *Roth, Memoirs* and *Jacobellis.*

There are twelve different magazines involved in the case herein (Petition for cert., App. A, p. 13). The trial judge found all twelve publications to be obscene. The Court of Appeals below, purporting to give petitioner the benefits of both the *Memoirs* and *Miller* standards, decided that six of the magazines were not obscene. Thus, the trial judge had found all the magazines to be obscene without at any time having ever considered whether such publications offended local community standards and, indeed, without any evidence in the record to indicate that the publications did violate such standards. On the other hand, the Court of Appeals found six of the magazines to be constitutionally protected and six others to be obscene because they offended local community standards, although the trial court had not so held and there was no evidence in the record to support such a finding.

The criterion of "local community standards" in federal obscenity prosecutions was first definitively enunciated by this Court in *Hamling*. The trial judge in the case herein was unaware of such a standard, the case having been tried in 1971. Since the case was tried only on the theory of national standards, and since the record was barren of any evidence of local community standards and the trial judge, on the record, was not

familiar with such standards, it is plain that the error committed in the case herein cannot be said to have been without material effect upon the result. Not only was the case confined to "national standards", but the petitioner was neither charged with violation of local standards nor was petitioner ever given the opportunity to prepare and present evidence of the local standards to the trier of the facts, a visiting judge from another State.

It is submitted that the petitioner has been deprived of his liberty without due process of law. He has been convicted on a charge never made and on a theory never tried. His judgment of conviction has been affirmed by an appellate court substituting itself for the trier of the facts, reweighing the evidence, and deciding a critical issue which was never submitted to the trier of facts. On this record, the judgment of conviction cannot be supported in the light of salient decisions of this Court. *Rabe v. Washington,* 405 U.S. 313; *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196; *Bollenbach v. United States,* 326 U.S. 607, 613; *Yates v. United States,* 354 U.S.298, 327; *Wilson v. United States,* 250 F.2d 312, 325 (9 Cir. 1958); *Samuel v. United States,* 169 F.2d 787, 792 (9 Cir. 1948); *Little v. United States,* 73 F.2d 861, 866-867 (10 Cir. 1934). See also, *New York Times Co. v. Sullivan,* 376 U.S.254, 284; *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S.6, 11; *Chapman v. California,* 386 U.S.18, 22-24; *Kotteakos v. United States,* 328 U.S.750, 776.

2. As heretofore stated, it was in *Hamling* that this Court for the first time definitively enunciated a criterion of "local community standards" for federal obscenity prosecutions. The indictment in the case

herein was returned on May 14, 1970, in the United States District Court for the Middle District of Florida. If, as was stated in *Hamling*, an indictment which charges the dissemination of "obscene" material "is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him" (Slip Op. 27-28), then the only meaning of the term as used in the indictment herein was that the publications named in the indictment exceeded national community standards. It was so understood by the government; it was so understood by the trial judge.

If, as stated by the majority opinion in *Hamling* and by the Court of Appeals here, petitioner is entitled to all the benefits of *Miller*, if due process and *ex post facto* infirmities are to be avoided, it is submitted that the indictment here is constitutionally invalid since petitioner was never advised that the publications exceeded the contemporary standards of Jacksonville, Florida. The sufficiency of the indictment here is as much in question as the sufficiency of the indictment in *Orito*, which led to remand by this Court. The judgment of conviction rests upon a palpably invalid indictment. Neither the Grand Jury which returned the indictment, nor the indictment itself, nor the judge who returned guilt upon the basis of the indictment, ever apprised petitioner that the material was charged with violating the local standards of Jacksonville, Florida, nor could petitioner expect that the judgment of conviction would be affirmed, based upon local community standards which were unknown to either the trial judge or to the appellate court on the record presented.

Petitioner has been denied the rudimentary rights of due process, the right to be apprised of the nature and cause of the accusations made against him and the

right to a fair trial. Petitioner submits that on this record there is a substantial federal question presented in the light of the ruling of the Court in *Hamling* and *Jenkins* with respect to the rejection of "national standards" and the substitution of "local community standards", as such new standard enunciated on June 24, 1974, affects the judgment of conviction herein. See, *Rabe v. Washington,* 405 U.S.313; *DeJonge v. Oregon,* 299 U.S.353; *Cole v. Arkansas,* 333 U.S.196; *United States v. Russell,* 369 U.S.749.

3. Three Justices of this Court (and assumedly a fourth Justice would agree) have stated that the denial of certiorari in the case herein was improper and that the Court has "failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins.* At a minimum, the Court should vacate the judgments below and remand for such a review". Mr. Justice White in *J-R Distributors, Inc. v. Washington,* No. 73-937, has stated his disagreement with the aforesaid Justices. The inclusion of the case herein within the scope of Justice White's disagreement overlooks the particular record here and the application of the Rules of the Court to this case in the light of their history, it is respectfully submitted.

The petition for certiorari was filed in this case on January 8, 1974. The petition for a writ of certiorari in *Hamling* was granted on January 14, 1974 (94 S.Ct. 893). The questions presented in *Hamling* were four-

teen in number and they included, among other things, not only the constitutional questions relative to the validity of 18 U.S.C. §1461, on its face and as applied to conduct committed prior to *Miller*, but also as to whether the material involved was or was not obscene and whether the material was entitled to constitutional protection. Assumedly, this Court deemed all the questions subtantial when certiorari was granted. See Rule 19(b) of the Rules of the Court.

The petition for writ of certiorari which was filed in this case one week before the grant of the petition in *Hamling* contained, among other things, the same or similar fundamental constitutional issues with respect to 18 U.S.C. §1462, and again the petition specifically presented the question as to whether the publications named in the indictment were or were not obscene and were entitled to constitutional protection. See Petition for Writ of Certiorari, page 4, Questions 5 and 6. The government never disputed the substantiality of the questions directly. Indeed, the government initially made no response to the petition until specifically requested to do so by the Clerk of this Court.[1] When the government finally filed its memorandum in opposition to the grant of the petition, it contented itself with reliance upon the brief which had been filed in *Hamling*, together with the argument which had already taken place in *Hamling*. The government concluded its brief memorandum in opposition by asserting that "Since these issues are presently pending in *Hamling*, however, we suggest that the Court should defer action

[1]The letter of April 18, 1974, from the Clerk to the Solicitor General stated that the "Court has directed this office to request that a response be filed in these cases." A copy of the letter was sent to counsel for petitioner, but there was no request by the Court for certification of the publications.

on these petitions until *Hamling* is decided" (Memorandum for the United States, p. 7).

In short, the issue of whether the publications involved were or were not obscene and entitled to constitutional protection was specifically presented to this Court at a time and under circumstances where petitioner was justified in believing, it is submitted, that the substantial questions would lead to the grant of certiorari as in *Hamling*. Plainly, with the grant of certiorari, the record, together with all the exhibits, would have been certified as has been the case since 1970, when the Rules were changed. That the Court decided to follow the government's suggestion, and await disposition of this case until the decision in *Hamling*, did not fairly apprise petitioner under the above circumstances that he would be deprived of the Court's independent constitutional judgment with respect to the material, merely because the publications had not been certified to the Court, when the Court itself had never called for the publications.

Rule 21 of the Rules of the Court was amended in 1970 to eliminate the need to file records with respect to the Court's determination as to whether a case was to be reviewed on the merits. The filing of the record had become a useless formality, and with rare exception the records which had been filed had not in fact been used by the Court at the time when certiorari was sought. The records had "largely lain dormant and unused in connection with the preliminary consideration of the case to determine whether it shall be reviewed; the storage space of the Clerk's office has been filled to overflowing with these records, and time and expense have been necessitated in order to repackage and

return the records to the lower courts following Supreme Court action". Boskey & Gressman, "The 1970 Changes in the Supreme Court Rules", 49 F.R.D. 682-683 (July, 1970). The revised Rule indicates that the Court has expressly reserved a right to request, through its Clerk, that all or any part of the record be certified and transmitted to the Court prior to action on a petition for certiorari.

In the light of all the aforesaid, it is submitted that petitioner is justified in requesting the Court to grant the independent constitutional judgment which *Jenkins* assured all accused in obscenity prosecutions. Mr. Justice White referred to Rule 23(4) in *J-R Distributors, Inc.*, but the petition for certiorari herein presents with accuracy, brevity and clearness whatever is essential to a ready understanding of the point with respect to the obscenity or nonobscenity of the material. See Petition for Certiorari, pages 38-41.

It should be noted that the trial judge in this case and the appellate court differed with respect to the constitutional protection to be afforded to the twelve publications here involved, and since the responsibility of this Court to review the material was not made clear until *Jenkins*, there is added reason for consideration by this Court.

While it has been assumed since 1970 that the Court would itself call for any portion of the record on a petition for certiorari if it so desired, petitioner has responded to the suggestion of Mr. Justice White that this burden be assumed by counsel and has formally requested both the Clerk of the Court of Appeals for the Fifth Circuit and the Clerk of the United States District Court, Middle District of Florida, to certify

the twelve publications involved herein. Copies of the letters are attached hereto as Appendices A and B.[2]

Finally, petitioner respectfully submits that the publications herein involved are not substantially different in the constitutional sense from those involved in *Trinkler v. Alabama*, No. 73-844, where this Court on July 25, 1974, granted certiorari and vacated and remanded for reconsideration in the light of *Hamling* and *Jenkins*.

4. The petitioner argued here that prior to the Court's decision in *Miller*, 18 U.S.C. §1462 did not contain in its language, nor had it been construed to apply to, the specific types of sexual conduct referred to in *Miller*, and therefore the section was unconstitutionally vague as applied to petitioner in the prosecution herein. The construction of the statute in *Hamling* was necessarily the first definitive construction of a federal obscenity statute to include the specific sexual conduct given as examples in *Miller*. Such a construction, of course, could only be prospective. However, with respect to the lack of a previous limiting construction, this Court stated that the petitioners in *Hamling* lacked the standing to raise the question. It was stated in *Hamling:* "Whatever complaint the distributor of material which presented a more difficult question of obscenity *vel non* might have as to the lack of a previous limiting construction of 18 U.S.C. §1461, these petitioners have none." (Slip Op. 25). The record herein is substantially different. There has been a finding that pandering and obtrusive dissemination are not involved in this case. The court below has found six of the publications to be entitled to constitutional protec-

[2]Letters have been written to the clerks of both courts because of the uncertainty of where the publications may be located at this time.

tion. There is a substantial question as to whether or not any of the publications are obscene and whether they are not, in fact, entitled to constitutional protection as a matter of law. Petitioner, therefore, does have the standing to raise the question, and it is submitted that the question of whether or not this Court has ever given a limiting construction to 18 U.S.C. §1462 prior to *Hamling* is a question of substantial importance.

5. In the above discussion, petitioner has not retraced the constitutional and legal arguments contained in the petition for certiorari. Petitioner is presenting, in essence, a substantial ground for rehearing available to petitioner, although not previously presented. That ground is bottomed upon the fundamental proposition that the aforementioned considerations outlined in the petition for rehearing herein justify a grant of the petition under this Court's responsibility to supervise the administration of criminal justice by the federal judiciary. The petition herein invokes this supervisory jurisdiction. The scope of this Court's reviewing power over convictions brought from the federal courts is not confined to ascertainment of constitutional validity. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States,* 318 U.S. 332, 340-341.

See also, *Saldana v. United States,* 365 U.S.646, 647 (sentence "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts"); *Elkins v. United States,* 364 U.S.206, 216 (silver platter doctrine abandoned upon invocation of "the Court's supervisory power over the administration of criminal justice in the federal courts"); *Marshall v. United States,* 360 U.S.

310, 313 (exposure of jurors during trial to newspaper articles entitles accused to a new trial "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts"); *Yates v. United States,* 356 U.S.363, 366-367 (sentence of district court in contempt action set aside in the exercise of the Supreme Court's "supervisory power over the administration of justice in the lower federal courts"); *Grunewald v. United States,* 353 U.S.391, 423-424 (danger that jury might make impermissible use of an alleged prior inconsistent statement admitted into evidence on the question of credibility justifies grant of a new trial under "our supervisory power over the administration of federal criminal justice"); *McCarthy v. United States,* 394 U.S.459, 464 (failure by the district judge to comply with F.R.Cr.P., Rule 11, results in reversal and remand "pursuant to our supervisory power over the lower federal courts"); *Offutt v. United States,* 348 U.S.11, 14 ("Therefore, justice must satisfy the appearance of justice.").

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner
Michael G. Thevis.

SAM ROSENWEIN,
Of Counsel.

Attorney's Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for petitioner Michael G. Thevis, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules, and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,
Attorney for Petitioner
Michael G. Thevis.

APPENDIX A.

Law Offices
Fleishman, McDaniel, Brown & Weston
A Professional Corporation
6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

August 8, 1974

Office of the Clerk
United States Court of Appeals
Fifth Circuit
400 Royal Street, Room 408
New Orleans, Louisiana 70130

Re: United States v. Thevis, et al.
No. 71-2614

Dear Sir:

The petitioner, Michael G. Thevis, has filed a petition for rehearing in the Supreme Court of the United States, seeking an order vacating the Supreme Court's denial of a petition for a writ of certiorari entered on July 25, 1974. The petition for rehearing is pending and is on the calendar of the Court.

The petitioner accordingly requests that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, each of the following publications which appear as government exhibits in the record.

As named in the indictment:

Count 1—"Duo"
Count 2—"Boys and Their Male Lovers"
Count 3—"Domino" Vol. 1, No. 1

Count 4—"Love Knot"
Count 5—"Wanton"
Count 6—"My Boys" Vol. 1, No. 1
Count 7—"In and its Nice"
Count 8—"The Girlfriends" Vol. 2, No. 2
Count 9—"Pussy Willow"
Count 10—"Arcadia" Vol. 6, No. 2
Count 11—"Teenage Jaybird"
Count 12—"Cloud 9" Vol. 6, No. 3.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON

/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Petitioner
Michael G. Thevis

SF/a

cc: Robert H. Bork,
Solicitor General
Robert Eugene Smith, Esq.

APPENDIX B.

Law Offices
Fleishman, McDaniel, Brown & Weston
A Professional Corporation
6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

August 8, 1974

Office of the Clerk
United States District Court
Middle District of Florida
Jacksonville, Florida 32201

Re: United States v. Thevis, et al.
No. 70-72-CR-J

Dear Sir:

The petitioner, Michael G. Thevis, has filed a petition for rehearing in the Supreme Court of the United States, seeking an order vacating the Supreme Court's denial of a petition for a writ of certiorari entered on July 25, 1974. The petition for rehearing is pending and is on the calendar of the Court.

The petitioner accordingly requests that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, each of the following publications which appear as government exhibits in the record.

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Count 11—"Teenage Jaybird"
Count 12—"Cloud 9" Vol. 6, No. 3.

Very truly yours,

FLEISHMAN, McDANIEL, BROWN & WESTON
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Petitioner
Michael G. Thevis

SF/a

cc: Robert H. Bork,
Solicitor General
Robert Eugene Smith, Esq.

IN THE

Supreme Court of the United States

FILED

JAN 10 1974

October Term, 1973

No. 73-1091

PEACHTREE NEWS COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EUGENE SMITH, Esq.
2005 - One Hundred Colony Square
Atlanta, Georgia 30361

GILBERT H. DEITCH, Esq.
2005 - One Hundred Colony Square
Atlanta, Georgia 30361

Counsel for Petitioner

Of Counsel:

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Jacksonville, Florida 32207

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III. The various United States Supreme Court rulings on obscenity promulgated on June 21 and June 25, 1973, effecting a substantial decisional change in the application of constitutional principles, cannot be applied retroactively to petitioner in the case at bar for conduct occurring prior to those decisions, and, the application of the statute to said petitioner is void as ex post facto legislation by virtue of Article 1, Sections 9 and 10 of the United States Constitution. 36

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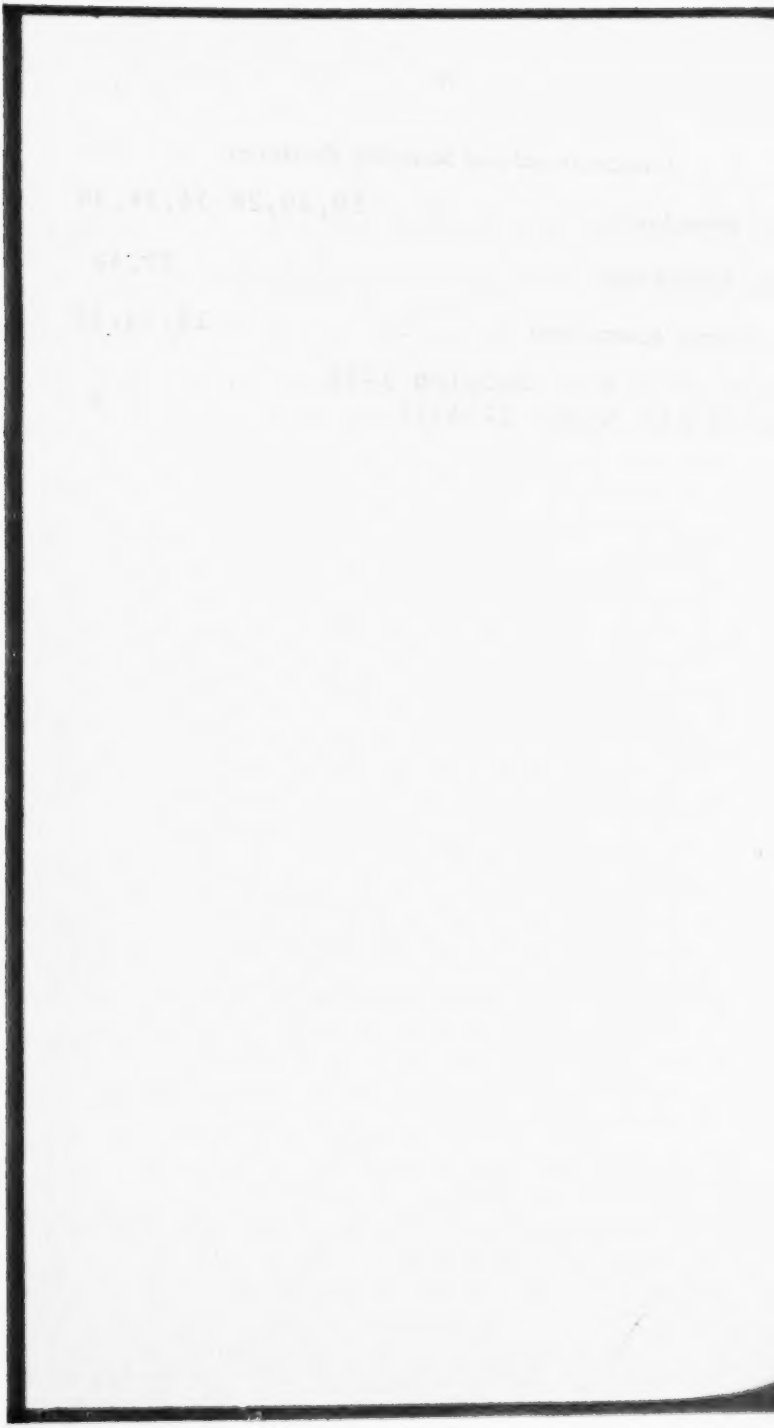


IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

PEACHTREE NEWS COMPANY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, PEACHTREE NEWS COMPANY, INC., a body corporate of the State of Georgia, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Order of that Court rendered September 12, 1973 affirming, in part, the

judgment of the U. S. District Court for the Middle District of Florida (Judge Joe J. Fisher presiding) against it in a non-jury trial for violation of Title 18 U.S.C. §1462, relating to transporting several alleged obscene books in interstate commerce

OPINION BELOW

The opinion of the U. S. District Court for the Middle District of Florida is reprinted at Appendix B, page 15 of Petition for Writ of Certiorari in Michael G. Thevis v. United States of America, case No. 73-1075. The judgment of conviction was affirmed on September 12, 1973 based in part on the opinion of the U. S. District Court and based also upon Miller v. People of the State of California, 413 F.2d. 15 (see Appendix A). A Petition for Rehearing was denied without a formal opinion on November 15, 1973 (see Appendix B).

The time to file the original Petition for Writ of Certiorari was extended by Order of this Court to January 10, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The Petition for Rehearing was denied on November 15, 1973. A timely request for extension of time within which to file a Petition for Certiorari was granted to January 10, 1974. This Petition is timely filed within that date.

QUESTIONS PRESENTED

I. ARE THE PROVISIONS OF TITLE 18, U.S.C. §1462 AS WRITTEN AND AS APPLIED HEREIN REPUGNANT TO THE FIRST AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY IN THAT THE DEFINITION OF WHAT IS DETERMINED TO BE OBSCENE DOES NOT MEET THE STRICT TESTS LAID DOWN BY THIS COURT IN MILLER V. CALIFORNIA?

II. ARE THE PUBLICATIONS INVOLVED IN THE CASE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED OFFENSE CHARGED AGAINST PETITIONER?

III. CAN THE VARIOUS UNITED STATES SUPREME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGE IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, BE APPLIED RETROACTIVELY TO PETITIONER IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS, AND, IS THE APPLICATION OF THE STATUTE TO SAID PETITIONER VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION?

IV. IS THERE A REASON TO GRANT CERTIORARI BECAUSE OF THE SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS IN THE APPLICATION OF MILLER STANDARDS TO PRE-MILLER CONDUCT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States,

Amendment I

Id, as pertinent:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Amendment V

Id, as pertinent:

> . . . Nor [shall any person] be deprived of life, liberty, or property, without due process of law; . . .

Article 1, Section 9

Id, as pertinent:

> No Bill of Attainder or ex post facto Law shall be passed.

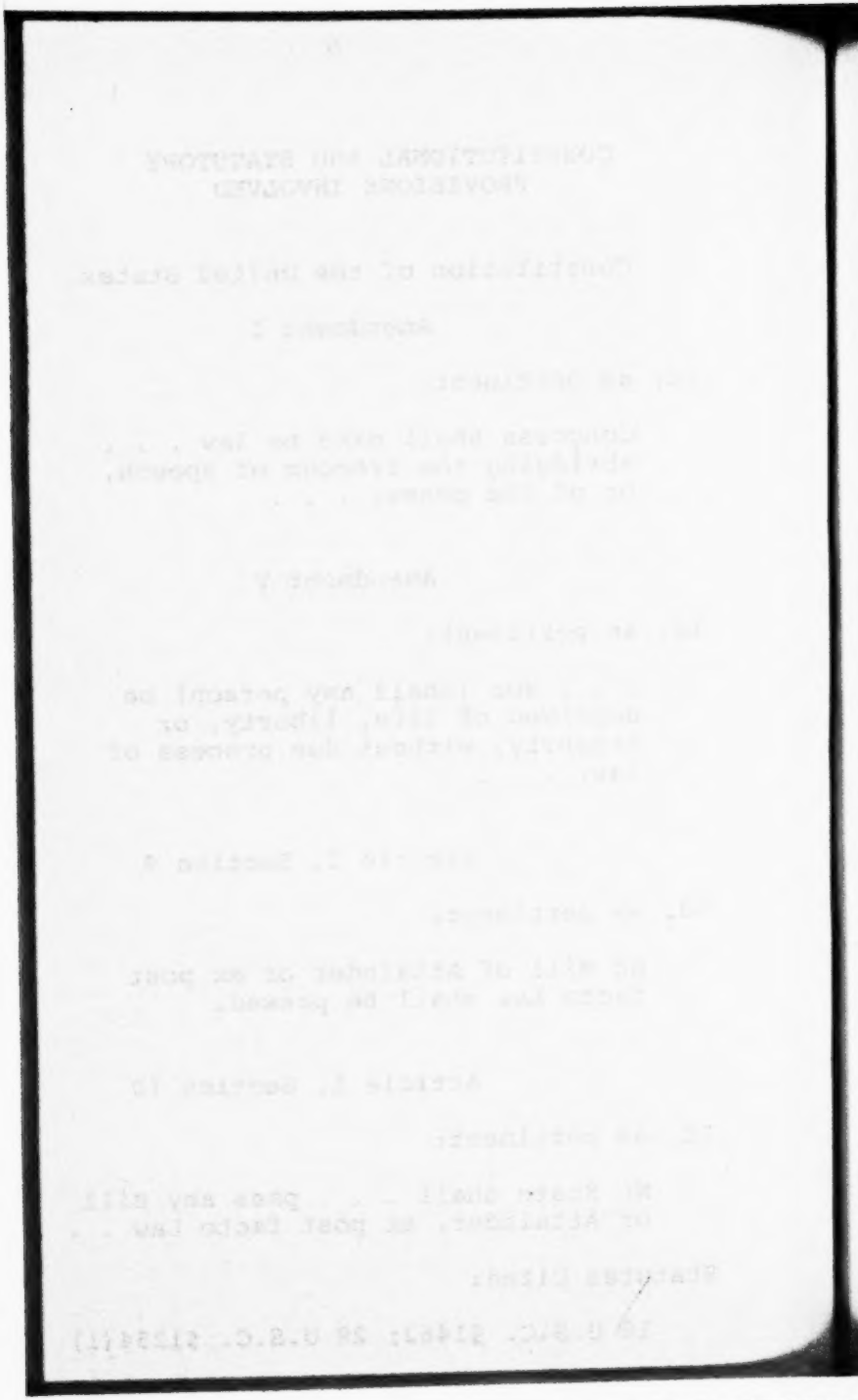
Article 1, Section 10

Id, as pertinent:

> No State shall . . . pass any Bill of Attainder, ex post facto Law . . .

Statutes Cited:

> 18 U.S.C. §1462; 28 U.S.C. §1254(1)



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STATEMENT OF THE CASE

A. Nature of the Case

On May 14, 1970 a twelve-count indictment was returned in the U. S. District Court for the Middle District of Florida, charging defendants-appellants MICHAEL G. THEVIS, individually, and PEACHTREE NEWS COMPANY, INC., a body corporate of the State of Georgia, with violation of Title 18 U.S.C. §1462. (The indictment may be found at Appendix C, pages 1-6.)

Except for the language of the publications, the language in each count is essentially the same and the publications charged as obscene were as follows:

Count 1 - "Duo"

Count 2 - "Boys and Their Male Lovers"

Count 3 - "Domino" Vol. 1, No. 1

Count 4 - "Love Knot:

Count 5 - "Wanton"

Count 6 - "My Boys" Vol. 1, No. 1

E TO EDGE

Count 7 - "In and its Nice"

Count 8 - "The Girlfriends" Vol.2, No.2

Count 9 - "Pussy Willow"

Count 10 - "Arcadia" Vol. 6, No. 2

Count 11 - "Teenage Jaybird"

Count 12 - "Cloud 9" Vol. 6, No. 3

B. Course of the Proceedings and Disposition

On July 10, 1970 defendants appeared in court at the arraignment to enter pleas of "not guilty" and a time was set for the filing of pretrial motions.

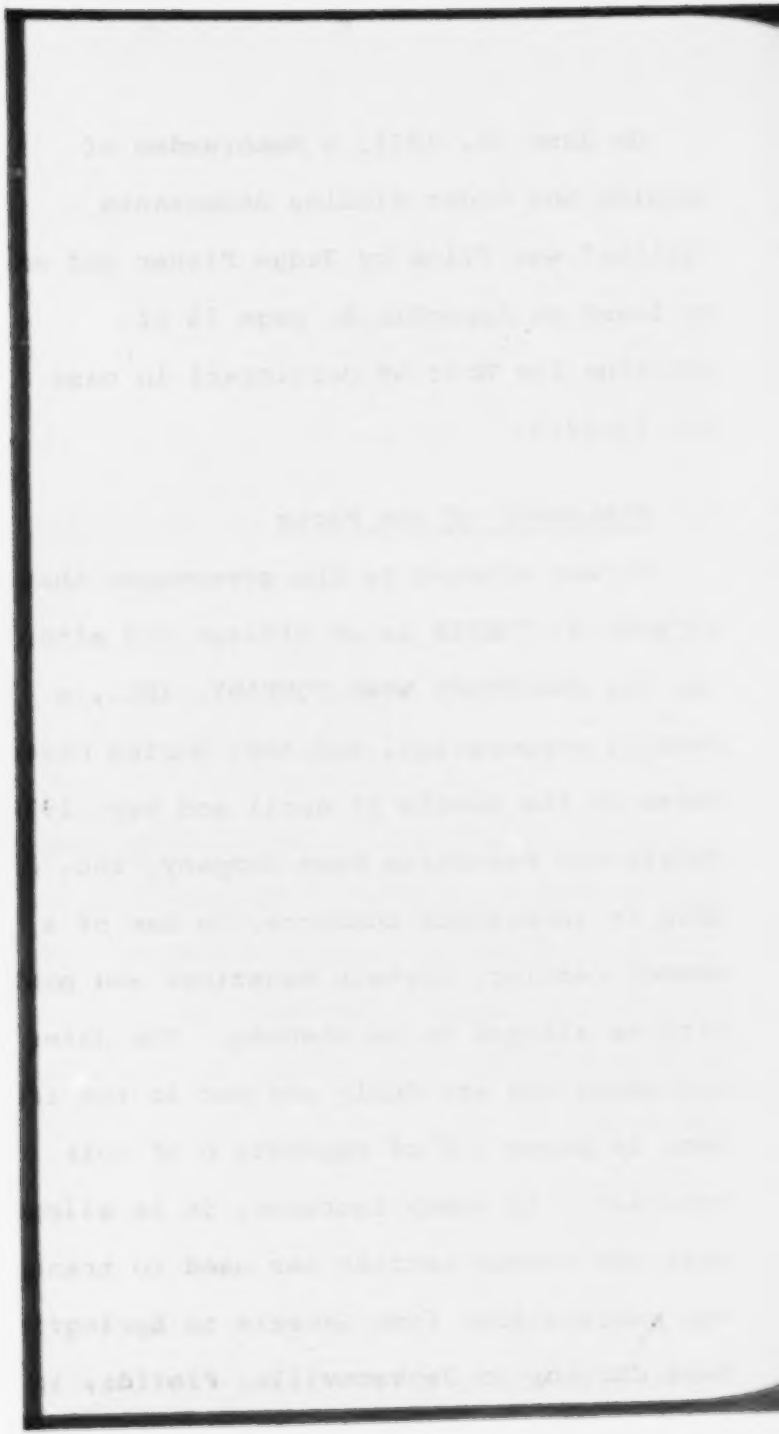
The motions were filed and were denied by the court and trial commenced before visiting Judge Joe J. Fisher of the Eastern District of Texas on October 30, 1970, without a jury, both parties having waived the same.

Taking of testimony was concluded on November 2, 1970, and the case was taken under advisement on that date with time given counsel to file briefs.

On June 25, 1971, a Memorandum of Opinion and Order finding defentants "guilty" was filed by Judge Fisher and may be found at Appendix B, page 15 of Petition for Writ of Certicrari in case No. 73-1075.

C. Statement of the Facts

It was alleged by the government that MICHAEL G. THEVIS is an officer and alter ego for PEACHTREE NEWS COMPANY, INC., a Georgia corporation, and that during certain dates in the months of April and May, 1970, Thevis and Peachtree News Company, Inc. did ship in interstate commerce, by use of a common carrier, certain magazines and publicaticns alleged to be obscene. The dates and magazines are fully set out in the indictment in pages 1-6 of Appendix C of this Petiticn. In every instance, it is alleged that the common carrier was used to transport the publications from Georgia to Springfield News Company in Jacksonville, Florida, in



violation of 18 U.S.C.§1462.

To prove its case, the government called various representatives of trucking lines to testify how certain materials did, in fact, move in interstate commerce on the approximate dates covered in the indictment and that the publications charged in the counts of the indictment were the publications moved in interstate commerce on the dates mentioned. The government further called as a witness the alleged proprietor of the Springfield News Company, the supposed consignee of the publications alleged to be obscene, together with one (1) of the former employees of said store.

Certain FBI agents and an ex-employee of Peachtree News Company, Inc. were called to testify regarding Mr. Thevis' connection with Peachtree News Company, Inc. and its business operation and activities.

Having utilized the categories of witnesses indicated to prove (a) interstate shipment of publications by (b) common carrier (c) on the approximate date indicated and (d) Mr. Thevis' alleged close involvement with the management and affairs of Peachtree News Company, the government took each of the twelve (12) publications charged with being obscene and submitted them to a psychiatrist by the name of DR. BLAINE E. MC LAUGHLIN, who it called as a witness. Dr. McLaughlin's testimony was to the effect that the publications appealed to the prurient interest, as he understood the definition of those words. He further stated that in his mind the material in question could cause people to act out with others than those to whom they had a pre-existing commitment of trust.

The defendants called two (2) expert witnesses on the question of the nonobscenit

of the publications. Dr. Frank Calhoun is a clinical psychologist in private practice in Jacksonville, Florida and a trained psychotherapist. After reviewing the materials charged against defendants, Dr. Calhoun was asked whether he had an opinion as to whether the materials appealed to a prurient interest in sex. His response was ". . . my opinion is that they do not." The doctor was asked whether these publications, or any of them, appealed to the prurient interest of the lesbian, and it was his opinion that they do not. It was asked whether the publications, or any of them, would appeal to the prurient interest of the homosexual, and he indicated that, in his opinion, they would not.

Dr. John Money from Johns Hopkins was called by the defendants and he is a medical psychologist who has been dealing

with people and their sexual problems for approximately twenty (20) years as a trained professional. He holds a joint professorship in both the University and the School of Medicine. Dr. Money testified that the material did not appeal to the prurient interest in sex of either average persons or homosexuals in our society, that the material had a value in society for their use as tools of education, and had serious social value and did not go substantially beyond the customary limits of candor in the representation of sex or nudity.

The trial court in its opinion found, in essence as follows:

(1) The publications are not "hard-core pornography;"

(2) The evidence does not involve obtrusive dissemination or an environment where the material is likely to fall into the hands of juveniles, and

(3) The magazines in question were not 'pandered'.

The Court denied the Motions for New Trial and entered judgment as follows as to petition corporation on June 25, 1971:

That Peachtree News Company, Inc. be fined $5,000 as to each of counts 1-12 but that the defendant be required to pay only $15,000 as to each of counts 1-12 on said fine for an aggregate sum of $18,000, the remaining balance of $3,500 as to each of counts 1-12 shall be suspended.

Counsel thereafter filed timely appeal under Rule 4(b) of the Federal Rules of Appellate Procedure, the same being dated and filed July 14, 1971.

On September 12, 1973 the Court of Appeals for the Fifth Circuit confirmed in part and reversed in part the decision, cited as 484 F.2d 1149. A Petition for Rehearing and Rehearing En Banc filed by both the government and defendant were denied on November 15, 1973.

REASONS FOR GRANTING THE WRIT

I.

THE PROVISIONS OF TITLE 18, SECTION 1462, OF THE UNITED STATES CODE AS WRITTEN, AND AS APPLIED HEREIN, ARE REPUGNANT TO THE FIRST, AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY IN THAT THE DEFINITION OF WHAT IS DETERMINED TO BE OBSCENE DOES NOT MEET THE STRICT TESTS LAID DOWN BY THIS COURT IN MILLER V. CALIFORNIA.

On June 21, 1973 the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has forever changed the operative obscenity laws.

The cases to which we make reference are as follows:

A. *Miller v. State of California,* 413 U.S. 15;

B. *Paris Adult Theatre I, et al v. Slaton,* 413 U.S. 49;

C. *U.S.A. v. Orito,* 413 U.S. 139;

D. *Kaplan v. State of California,* 413 U.S. 115;

E. *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, et al.,* 413 U.S. 123.

Predicated on the foregoing decisions, the Court on June 25, 1973, by summary action and/or *percuriam* decisions vacated sixty (60) other obscenity cases on its docket in which no prior action had been taken. For a summary review of the cases to which we make reference herein, please note 413 U.S. 902 to 916.

All of the vacated cases, without exception, proceeded under the *Roth - Memoirs* formulation and included one, *Cote v. U.S.A.*, No. 71-1120,413 US 915 ,wherein the defendant plead guilty and thereafter challenged the constitutionality of the statute on appeal. All cases were, as previously stated, vacated and remanded for disposition by the lower courts.

As we have previously contended, it is the position of Appellant that the statute under which it has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 [1957].

When dealing with a claim of void for vagueness in the penumbra of the *First Amendment,* we must be mindful of the decision of the United States Supreme Court in *U.S.A. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963), wherein the Court stated:

"In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v, [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L.Ed.2d 405]."

To support our contention herein, we should like to briefly review the written opinions identified herein as cases (A) through (E) as will support our position.

Mr. Chief Justice Burger, in *Miller v. California, supra,* conceding the failure of the Court to set forth precise constitituional standards, writes in part as follows:

"Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States[police power. See, e.g. Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted].' Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 704-705 (1968) (Harlan, J., concurring and dissenting)."

In a footnote 3 of the majority opinion appended to the foregoing quote, we read:

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434, 435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."

The majority opinion further points out:

"The case we now review was tried on the theory that the California Penal Code §311 approximately incorporated the three-stage Memoirs test, supra. But now the Memoirs test *has been abandoned* as unworkable by its author and *no member of the Court today supports the Memoirs formulation.*" (Emphasis supplied.)

After recognizing the failure of any constitutional definiation of what is obscene accepted by a majority of the Court, the opinion of Mr. Chief Justice Burger goes on to state the singular unvarying factor which represents a consensus of prior decisions of the Court:

"This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229

(1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra 343 U.S. at 502 (1952)."

Thereupon the Court goes on to state what it now promulgates as a new constitutional standard for State cases (and in *U.S. v. Orito, supra,* and *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, supra* [see footnote] made potentially applicable to a federal obscenity case, after legislative enactment or authoritative judicial construction by the United States Supreme Court):

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future

legislative enactment or authoritative judicial construction (if possible) stated :

> 'Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

It is important to note the context in which the Court was called upon to define the press materials that a State could permissibly regulate, and, in *Miller v. California, supra,* the new constitutional gloss placed on obscenity-pornography cases must be considered in light of the aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive sexually explicit materials. In Mr. Chief Justice Burger's opinion appears the following caveat:

> "This case involves the application of a State[s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S.

629, 637-643 (1968). Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

See also footnote 2 in further explanation.

Miller v. California, supra, is the key case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment.* It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpenss of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by the Court in *Miller v. California, supra,* as far as specifically designating prohibited material is concerned. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope

of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guidelines necessary to forewarn a potential wrong doer. The element of the three part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the federal statute where we read:

> "(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct in a patently offensive way, sexual conduct that is specifically defined by state law . . . If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated."

Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the Congress, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

The United States Supreme Court gave at least fourteen (14) "plain examples" of what state legislatures could define as patently offensive, hard core sexual conduct. Therefore it is fair to apply those examples and ask the following questions using the plain wording of the examples given by Mr. Chief Justice Burger:

(1) What patently offensive representation of ultimate, normal, actual, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(2) What patently offensive representation of ultimate, perverted, actual sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(3) What patently offensive representation of ultimate, normal, simulated, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(4) What patently offensive representation of ultimate, perverted, simulated, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(5) What patently offensive representation of masturbation is defined or specified in the law in question or by authoritative judicial construction?

(6) What patently offensive representation of excretory functions are defined or specified in the law in question or by authoritative judicial construction?

(7) What patently offensive representation of lewd exhibition of the genitals is defined or specified in the law in question or by authoritative judicial construction?

(8) What patently offensive description of ultimate, normal, explicity actual sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(9) What patently offensive description of ultimate, perverted, explicit actual sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(10) What patently offensive description of ultimate, normal, simulated sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(11) What patently offensive description of ultimate, perverted, simulated, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(12) What patently offensive description of masturbation is defined or specified in the law in question or by authoritative judicial construction?

(13) What patently offensive description of excretory functions are defined or specified in the law in question or by authoritative judicial construction?

(14) What patently offensive description of lewd exhibition of the genitals is defined or specified in the law in question or by authoritative judicial construction?

The answer to all the questions is NONE and these are only fourteen (14) examples of what the Congress could do in creating or specifying new operational obscenity statutes.

In other words, it is one thing to "elaborate" on the Roth test as did the Memoirs court without judicially legislating. It is another to "create anew and engraft the Miller test" onto the present statutes. Any conviction or indictment pending trial based on the present statute judicially incorporating the Miller test of specificity should be set aside. It is clear that any authoritative judicial construction by the United States Supreme Court incorporating the Miller test must fail at this juncture because the statute as written fails to give any person fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at this point in time.

upon a new Supreme Court suggested test that only legal researchers could appreciate at this point in time.

The United States Supreme Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of law. Engrafting *Miller* standards into the statute as written or a might be subsequently construed by authoritative judicial construction in an effort to prevent Congress having to take the trouble to enact a new statute, punishes one for conduct that was not criminal at the time that it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the U.S. statute because it fails to give a person or ordinary intelligence fair notice that his contemplated conduct is forbidden by its provisions. No man can be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

The apparent constitutionally impression of the Alabama statute, if this Court takes no action, will become retroactively expanded by judicial construction to the detriment of the ordinary adult in our society. Facially, the statute is void for vagueness. The man in the street looking at this statute, however, will be lulled into a false sense of security because he has no reason to suspect that conduct clearly not described in the statute and outside of the scope of the statute as written could be retroactively brought within the statute by an act of judicial construction, depending on

the judicial district. A deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of vague and imprecise statutory language, which is what the United States will seek to convince this Court that it should do.

This Court's failure to strike down the applicable statutes as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retoractively, and which will operate precisely like an *ex post facto* law. All those actions done before the United States Supreme Court's announcing of new standards and which were done innocently under old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the *Constitution* from passing laws of this nature and surely this Court and the various inferior courts must be barred by the due process clause from achieving precisely the same results by judicial construction.

It is interesting to note that in only one case, *Kaplan v. California, supra,* did this Court affirmatively agree that the publication ("Suite 69") was obscene under the *Roth – Memoirs* formulation, which was an express part of the California Penal Code §311 (at page 4960) but, notwithstanding the concurrence of the majority of the United States Supreme Court with the independent constitutional judgment of the California appellate courts on review that the said publication was obscene, and notwithstanding the further finding by the Court that:

> "On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law to support Petitioner's conviction."

The case was also vacated and remanded.

The action of this Court in vacating and remanding is an express acknowledgement of the patent unconstitutionality of the California Penal Statute. This Court sent the matter back to the appellate court for disposition consistent with its decisions announced on June 21, 1973, including the possibility of allowing the appellate court to make, if it could, a judicial construction to be applied prospectively. It is clear that the California appellate court was given an opportunity to establish, if it could consistent with its constitutional authority, an authoritative judicial construction of the regulating State statute which would implement the newly announced permissible constitutional standards for judging proscribable obscenity, including 'hard core' sexual conduct that is specifically defined by State law.

It is clear, then, that in the event of such a ruling, Mr. Kaplan should not be held accountable.

The Supreme Court has stated:

> "A ruling which is purely prospective does not apply even to the parties before the Court." Linkletter v. Walker, 381 U.S. 618 (1965) at page 621.

See also:

England v. Board of Medical Examiners, 375 U.S. 411;

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

II.

THE PUBLICATIONS INVOLVED IN THE CASE ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED OFFENSE CHARGED AGAINST THE PETITIONER.

The pictorial magazines involved herein are comparable to those held protected by this Court in Wiener v. California, 404 U.S. 988 (1971), as well as other decisions of this Court citing Redrup v. New York, supra, as authority.

Ever since the United States Supreme Court determined, in Roth v. United States, supra, that the First Amendment did not protect obscene materials, it has necessarily assumed the responsibility of devising formulae for recognizing the "dim and uncertain", Bantam Books v. Sullivan, 372 U.S. 58, 60 (1963), which separates obscenity from protected expression. That the Court, in its attempts to separate obscenity from protected expression, has had its difficulties in articulating clear standards for prosecutors, courts, and citizens to follow is readily apparent from the multitude of

citizens to follow is readily apparent from the multitude of fragmented opinions, which have emanated from the Court in lieu of clear majority decisions; *e.g., Memoirs v. Massachusetts,* 383 U.S. 143 (1966); *Ginzburg v. United States, supra; Jacobellis v. Ohio,* 378 U.S. 184 (1964), and the numerous others without opinion which have characterized the Court's efforts in this sphere.

This Court on June 21, 1973, long after the time of the alleged offense, has articulated standards for the future which they suggest will pass constitutional muster in *Miller v. California* and the other cases decided on that day. The majority of this Court attempted to find a solution to the imprecision of the various standards relied upon by the members of the Court prior tothis time and set out to fashion such new standards.

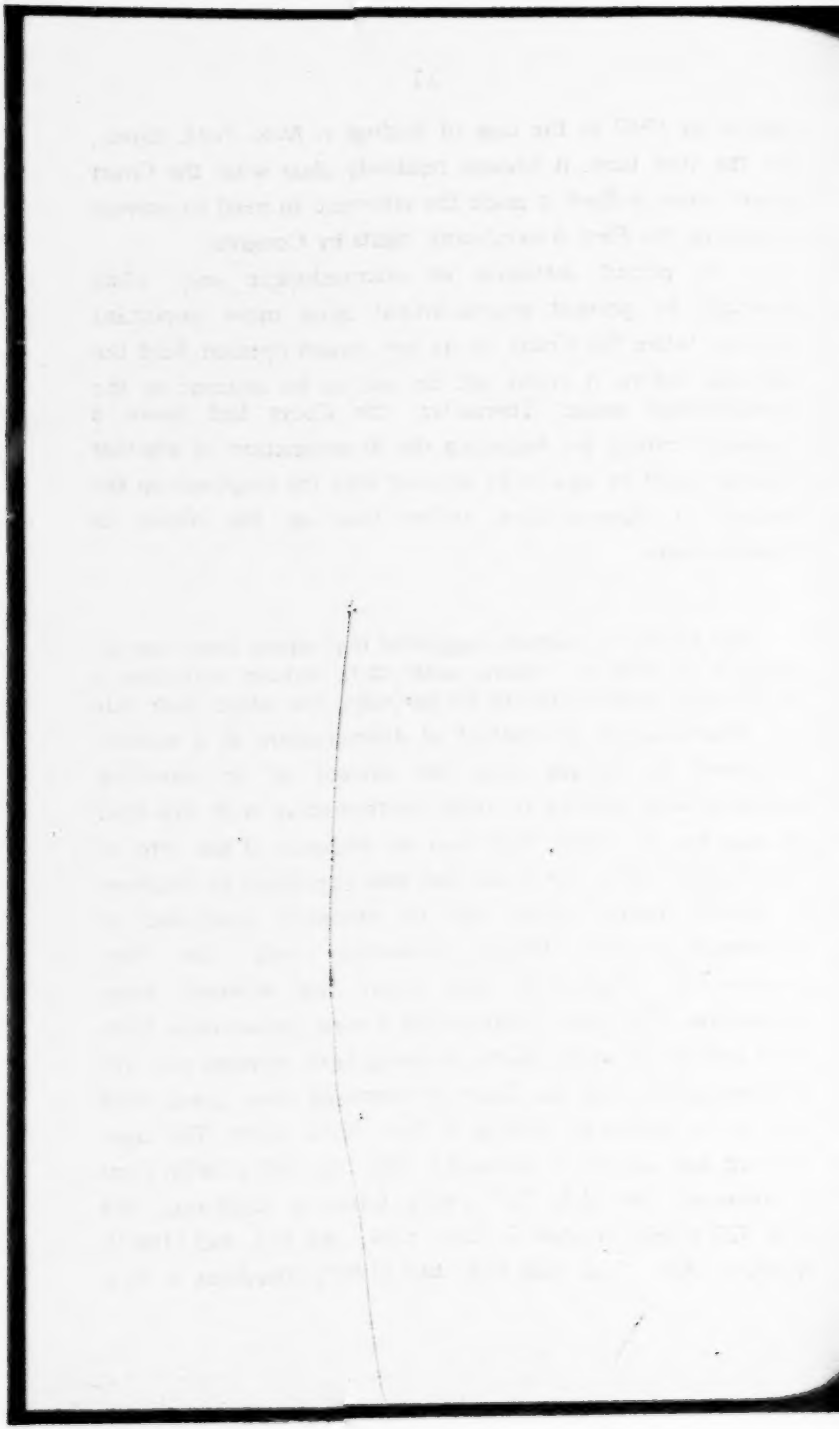
The Petitioner should be judged, if at all, by the status of the law on the standards being applied by the Courts as of the time of the commission of the alleged offense (April and May 1971) Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the Redrup approach, and we shall address ourselves to the status of the law as it was prior to June 21, 1973 for the purposes of this argument.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after Roth, but it is significant to note a trend developed, which found

fruition in 1967 in the case of *Redrup v. New York, supra,*. For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the *First Amendment.* rights by Congress

to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

This Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in *Ginzburg v. United States,* supra, that no obscenity confiction or suppression could follow consistent with the *First Amendment.* Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky,* 386 U.S. 767 (1967); *Gent v. Arkansas,* 386 U.S. 767 (1967); *Ratner v. California,* 388 U.S. 422 (1967); *Cobert v. New York,* 388 U.S. 443 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New*



York, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Deykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina, supra, Wiener v. California, supra; Hartstein v. Missouri*, 404 U.S. 988, 30 L.Ed. 2d 539 (1971).

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression,[1] a majority of the Court has yet to agree on a precise test for determining obscenty.[2]

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[1] But see Stewart, J., dissenting in *Ginzburg v. United States, supra:* "It is not accurate to say that the *Roth* opinion 'fashioned standards' for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved (354 U.S. at 481, n. 8). And in no subsequent case has a majority of the Court been able to agree on any such 'standards'."

[2] Probably the verbal formula closest to consensus so far appeared in *Memoirs v. Massachusetts, supra:* "... three

Admitting that the *Roth* Formula "is not perfect", *Jacobellis v. Ohio, supra,* raises "difficult problems", *Ibid.*, and is afflicted with "perhaps inherent residual vagueness", *Ginzburg v. United States,* supra, the Court's decision to adhere to *Roth* – "that we should try to live with it – at least until a more satisfactory definition is evolved", *Jacobellis v. Ohio, supra,* at 200 – was an interim accommodation to the Court's inability to reach a real consensus on the subject. Subsequent experience with the problem has produced no greater unanimity. Two Justices, Black and Douglas, who dissented in *Roth,* had never accepted the principle that obscenity may be regulated without violence to the *First Amendment* (see E.g., *Ginzburg v. United States, supra* at 476 [Black, J. dissenting] and at 482 [Douglas, J., Dissenting].

A third, Justice Stewart, held the view that obscenity regulation may be constitutional only if applied to "hard-core pornography."[3] Yet a fourth, Justice Harlan, had, when on

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(Footnote 2 Continued)
elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. 413, 418 (1966).

[3] A preliminary, rather unilluminating definition of hardcore pornography, "I know it when I see it", *Jacobellis v. Ohio, supra* at 197 (Stewart, J., concurring) has been supplemented by Justice Stewart by the following description "of the kind of thing to which I have reference": "Such materials include photographs, both still and motion picture, with no pretense of artistic value, *graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism,* and sometimes involving several participants in scenes of orgy-like character . . ." *Ginzburg v. United States, supra* at 499, n. 3 (Stewart, J., dissenting). (Emphasis added.)

the bench, adopted the "hard-core pornography" test as to federal prosecutions, but had urged more latitude for conviction in state criminal cases. *Jacobellis v. Ohio, supra* at 204 (Harlan, J., dissenting). Justice Brennan, together with former Chief Justice Warren and former Justice Fortas, had adhered to the three-pronged enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, (1966), *set out in full in Ginzburg v. United States, supra* at 476 (Black, J., dissenting) and at 482 (Douglas, J., dissenting), a "not dissimilar standard" from the "hard-core pornography" test. The *per curiam* opinion in *Redrup v. New York* so equates the hard-core pornography test and the three-pronged *Memoirs* test. 386 U.S. 767, 770-771 (1967). And there are indications that three (3) of the newer justices, Chief Justice Burger, and Justice Blackmun, *Ibid.,* follow Justice Harlan's views and that Justice Marshall (see majority opinion in Marshal, J., in *Stanley v. Georgia,* 394 U.S. 557 (1969)) has adopted Justice Brennan's conception of *First Amendment* interpretation in this sphere.

Moreover, a majority of the Court has united to underscore the irrelevancy, for constitutional purposes of the claim that material is "arguably devoid of any ideological content", for "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all", *Stanley v. Georgia, supra,* citing with approval, *Winters v. New York,* 333 U.S. 507 (1948).

Findings of obscenity have been reversed as to publications devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including

detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g., Memoirs v. Massachusetts,* supra, ("Fanny Hill"); *Aday v. United States, supra* ("Sex Life of a Cop", see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry, supra,* ("Sin Whisper", see description of book at 146 S.E. 2d 764); *Mazes v. Ohio,* supra, ("Orgy Club"); *Hoyt v. Minnesota, supra,* ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to motion picture films, the Court has reversed findings of obscentity as to films which depict totally nude women, films which show nude or partially nude woman and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom., Pinkus v. California.*

Thus, the only conclusion which could have been rationally extrapolated from these decisions without opinion is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in

sexual poses and movement, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial test material, then requisite social value is present and thus, the material would not be obscene.

The press materials at bar when considered as a whole, and as judged against press materials of similar or more explicit sexual content – heretofore, determined by this Court, prior to June 21, 1973 not to be obscene in the constitutional sense, should thus be protected, and the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

III.

THE VARIOUS UNITEDSTATES SUPREME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGE IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, CANNOT BE APPLIED RETROACTIVELY TO PETITIONER IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS AND, THE APPLICATION OF THE STATUTE TO SAID PETITIONER IS VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION.

The newly announced decisions of the Supreme Court in which reference has been made herein represented "a clear

break with the past," in the words of Mr. Justice Stewart in *Desist v. United States,* 394 U.S. 244, 248 (1969).

On June 25, 1973 in a matter coming out of the Fifth and Second Circuits, the United States Supreme Court updated and restated its concept of retrospective and prospective application of decisional law making.

In the case of *Gosa v. Mayden,* et al, 13 CrL 3248, the question of the application of the new constitutional concept is discussed in detail, as stated in part at page 3251:

> "Rather, the prophylactic rule there formulated 'created a protective umbrella serving to enhance' a newly recognized constitutional principle. Michigan v. Payne, ____U.S.____ (1973). (41 LW 4671). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In Williams v. U.S.A., 401 U.S. 646, 651 (1971) Mr. justice White made it clear citing Linkletter v. Walker, 381 U.S. 618 (1965), that the Court has 'firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored."

See the extensive discussion of this subject in the following cases:

A. *Linkletter v. Walker,* Supra;

B. *Stovall v. Denno,* 388 U.S. 293, 297 (1967);

C. *Desist v. United States,* supra;

D. *Robinson v. Neil,* 409 U.S. 505 (1973);

E. *Michigan v. Payne,* Supra.

See also:

"Comment: Retroactive or merely prospective operation of new rule adopted by Court in overruling precedent – federal cases." 14 LEd 2d 992.

"Prospective Overruling and Retroactive Application in the Federal Courts." 71 Yale L.J. 907 (1962).

The United States Supreme Court on June 21 and June 25, 1973 vacated and remanded approximately sixty-eight (68) obscenity cases to the lower courts for final disposition. It is clear that the action of the Supreme Court in this regard in vacating and remanding the said sixty-eight (68) cases, including ones in which the Defendants were criminally charged with violation of the Tennessee obscenity laws, was done so with the intent that the cases be dismissed. The rationale of *Miller v. California,* supra (see *U.S. v. 12-200 Ft. Reels of Film,* supra, n. 7) is to apply only prospectively as the language of those decisions makes clear, because there was no constitutionally valid test pertaining to obscenity agreed to by a majority of the Court that would give fair warning to a defendant that his proposed course of conduct would subject him to possible criminal prosecution, and thus said vague laws were violative of the *Fifth* and Sixth *Amendment* rights of such defendants. A federal judge in the U.S. District Court for the Central District of California (Judge Pregerson) on Wednesday, July 11, 1973 dismissed a federal indictment on a Motion to Dismiss for this very reason. The case is styled as *U.S. v. Lang,* 10712-HP-CD, U.S.D.C. for the Central

District of California. State *nisi prius* court judges have dismissed indictments and/ir informants against defendants in Indiana as well as the States of North Carolina, Louisiana and California on the basis that the same were brought under a law which is now lacking in specificity according to the Supreme Court decisions and thus unconstitutional as applied to the various defendants before the Court.

It has been some period of time since the decisions of June 21 and June 25, 1973– time for some appellate courts to have considered and ruled on the question of the retroactivity aspect of the said rulings as they may relate to defendants tried and/or indicted for events occurring before June 21, 1973.

Such an example is a holding by the Supreme Court of Indiana which, on August 21, 1973, reversed the convictions of the defendants in two cases in which certiorari was granted and the cases remanded on June 25, 1973 by an order identical to the order in this case. The two cases are *Stroud v. Indiana,* 273 N.E.2d 842 (1971) and *Mohney v. Indiana,* 276 N.E.2d 517 (1971) ,wherein they unanimously held:

> "The main thrust of those opinions so far as applicable to this case is that the statute under which the appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.
>
> Pursuant to the order and direction of the U.S. Supreme Court we hold the statute involved in this case is unconstitutional on the grounds announced by that Court.

Therefore pursuant to the order of the United States Supreme Court the judgment and conviction of Appellant – Defendant is reversed and remanded to the trial court, and pursuant to the order of the United States Supreme Court, the trial court is directed to discharge the Defendant.

All Justices concur."

The two cases which reversed the convictions are *Stroud v. State* ____ Ind. ____, 300 N.E. 2d. 67 (1973) and *Mohney v. State* ____ Ind. ____, 300 N.E.2d. 100 (1973)

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *(United States v. Harriss,* 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.,* 269 U.S. 385, 391.

The United States Supreme Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of law, Ibid., and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453.

See also:

A. *Rabe v. State of Washington,* 405 U.S. 313 (1972);

B. *Wright v. State of Georgia,* 373 U.S. 284 (1963);

C. *Palmer v. City of Euclid,* 402 U.S. 544 (1961);

D. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

If the newly announced constitutional principles promulgated by the United States Supreme Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner in the case at bar for alleged conduct said to be violative of the statute at a time during April 1971, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10.

An ex post facto law has been defined by the United States Supreme Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* that it was, when committed." *Calder v. Bull,* 3 Dall 386, 390 (Emphasis supplied).

This Court has said that "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *King v. Missouri,* 107 U.S. 221, 135.

To put this question in better prospective, we should like to discuss the summary of the general principles that would

relate to indictments and/or informations charging violations of State and/or federal laws pending trial or on appeal as of June 21, 1973 for conduct purportedly engaged in prior to that time:

A. BLACKSTONE'S RETROACTIVE THEORY THAT A COURT MERELY DISCOVERS WHAT THE LAW HAS ALWAYS BEEN WAS REJECTED BY THE U.S. SUPREME COURT.

Thy common law theory of Blackstone was that in a new decision overruling prior decisions or putting a non-judicial gloss on a statutory interpretation the courts merely discivered what the law always was and had been, and therefore did not effect any change in the law, and thus was retroactive. The theoretical basis for this has now been rejected. *Linkletter v. Walker*, supra, at pp. 622-623 (1964); accd. *United States v. Fay*, 333 F.2d 12, 15-16 (2d Cir. 1964), with citations. In *Linkletter* the court, 381 U.S. at 623, said:

> 'Thus the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective."

This statement follows a five-page discussion of what the court calls the history and theory of the Blackstonian rule that "the judge rather than being the creator of the law was but its discoverer" (381 U.S. at 623) as contrasted to the Austin theory that judges do engage in intersitial lawmaking (not rewriting of statutes). In rejecting the Blackstonian theory of automatic retroactivity, the court held (381 U.S. at 627) that there was no distinction to be drawn between

criminal and civil litigation, and specifically cited the criminal income tax evasion case of *James v. United States*, 366 U.S. 213 (1961), as an example of prospective overruling in a criminal case.*

Linkletter, supra, which rejected this Blackstonian theory involves the start of the whole body of case law to determine whether expanding constitutional safeguards in favor of defendants in State criminal trials, i.e. the *Fourth, Fifth* and *Sixth Amendments*, were to be applied retroactively or prospectively. See Annotation, 22 L.Ed. 2d 824-858. The considerations in our case are quite different, but some of the principles as to when constitutional protections are to be applied retroactively may be helpful. In any event, the Blackstonian principle of automatic retroactivity has been explicitly rejected and, in addition, the decision is not retroactive on *ex post facto* and related principles.

B. LACK OF FAIR NOTICE RULE.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta v. New Jersey*, supra, at page 453 (1939); *United States, v. Harriss*, 347 U.S. 612, 617 (1954); *Rabe v. Washington*, supra, at page 316 (1972).

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*In *James* the criminal conviction for federal income tax evasion was set aside on the grounds that the taxpayer had a right to rely on the judicial gloss placed on the statute.

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie v. City of Columbia,* supra, at p. 352, the court said:

> "* * *If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta,* or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

C. ANALYSIS OF THE MILLER DECISION.

Part I of the *Miller* decision traces the history of the obscenity law from *Roth.* It states (slip op. p. 7) that "apart from the initial formulation in the *Roth* case, no majority has at any time been able to agree on a standard," that the *Memoirs* test was a plurality test only, and that as of June 21, 1973 even Memoirs had been abandoned by all members of the court.

Since under Part I of the *Miller* decision there were no standards, the court thereupon in Part II proceeded to set forth a new three-fold or tripartite test to serve as a basis for the prosecution *only when* and provided that under the second prong of the test patently offensive hard-core sexual conduct was specifically defined so as to give fair notice. The court (slip op. p. 9) states it acknowledged the dangers of regulating expression, and hence, the definitions of sexual conduct which can be prohibited "must be specifically defined by applicable State law as written or authoritatively construed."

After the court set forth the new tripartite test with examples of what might be proscribed as patently offensive depictions of sexual conduct, the court continued (slip op. p. 12):

> "Under the holdings announced today, *no one will be subject to prosecution* for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined* by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. * * *" (Emphasis supplied.)

On page 14 of the slip opinion the court reiterated that it was only on June 21, 1973 that the court had agreed on concrete guidelines to isolate hard-core pornography. The Court said:

> "* * * But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, supra, and attampt to provide positive guidance to the federal and state courts alike." (Emphasis supplied.)

D. UNITED STATES V. 12-200 FT. REELS FOOTNOTE 7 – PROSPECTIVE APPLICATION.

In footnote 7 the court said that it was the duty of federal courts to authoritatively construe federal statutes and "we are prepared to construe such terms (i.e. obscene, lewd,

lascivious as used in the statute) as limiting regulated material to patently offensive *representations or descriptions of that specific hard core sexual conduct given as examples in Miller v. California.*" (Emphasis supplied.) We pass for the moment just how the court could construe a federal statute for arrests after June 21, 1973 with this wide range of permissible definitional options without legislating and without invoking an *Erie v. Tompkins* doctrine, and turn to prospective application.

(i) The court is prepared (in the future) to construe the federal statute to limit it to depictions of "hard core sexual conduct" which were for the *first time* and as of June 21, 1973 specifically set forth in *Miller.* This is a very clear statement that as of June 21, 1973 there was no definition of patently offensive hard-core sexual conduct, which the court said *must* be present before there can be any prosecution. Criminal convictions are not predicated on noneexistent standards and nonexistent definitions.

(ii) It would appear that the judicial statement in footnote 7 of the decision in *12-200 Ft. Reels,* supra, purporting to overrule a case wholly prospectively is in fact no more than a dictum, since it is by hypothesis, inapplicable to the parties or the controversy before the court. Nevertheless, such a dictum may be significant, with respect no future transactions or evens, as an indication that further reliance on the "overruled" case is no longer justified. In fact, such a dictum can achieve virtually the same effect without even using the word "overrule" in connection with the earlier decision. That is, the court, without declaring the earlier decision overruled, can simply issue a warning that subsequent to the date of the court's opinion or some specified future

date, any reliance on the earlier decision is unwarranted. If a person subsequently attempts to rely on the earlier decision despite this warning, the court, in deciding that person's case, can conclude that reliance after the date specified in the warning was unjustified, and the court can then declare, as a holding rather than as dictum, that the earlier decision is overruled. Thus, by using a two-stage overruling process, consisting first of a warning in the form of a dictum and secondly, if necessary, of a holding overruling an earlier decision, the court can achieve a desirable effect by changing a bad rule without defeating any strong, justifiable reliance interests.

Accordingly, it is conceivable that in the context of the enforcement of the State obscenity laws, which laws can only be authoritatively construed by a state appellant Court, that what this court has done is forewarned individuals who propose to engage in the business of selling sexually explicit materials that they may no longer rely upon the more permissive standards of the *Roth-Memoirs* formulation after the date of the court's decisional change of June 21, 1973. Any defendant on appeal to the high court for conduct engaged in post-June 21, 1973 may no longer say that a judicial construction in his case would be *ex post facto* when applied to him because as of the date of his alleged offense the court had not "authoritatively construed" federal statutes because, as was made significant in *Bouie v. City of Columbia*, supra, the hypothetical defendant could have foreseen the judicial gloss that was to be placed on the statute and thus the two-stage process suggested herein would be complete by (a) the authoritative judicial construction on the state obscenity statute, and (b) the affirmation of the conviction of a defendant tried under the proposed application of that statute for post-June 21, 1973 conduct.

To this counsel, the foregoing analysis is the only common sense one with regard to the intent of the court in its carefully chosen language utilized in footnote 7 of *12-200 Ft. Reels of Film*, supra, as to Federal legislation.

E. EX POST FACTO JUDICIAL LAWMAKING PROHIBITED.

As stated, criminal convictions are not predicated on nonexistent standards. At the same time, the new test and permissible definitions of legally proscribable obscenity may not be applied retroactively, which is why, incidentally, there were no affirmations of convictions by the Supreme Court in the sixty-eight (68) cases before it and vacated.

Under *Linkletter*, supra, the Blackstonian theory of automatic retroactivity was abandoned. In addition, in determining whether a new decision should be applied retroactively the Supreme Court has specifically held that unforeseen judicial enlargement of criminal statutes is prohibited as an *ex post facto* law, *Bouie v. City of Columbia*, supra, and many authorities, while not labeling it *ex post facto*, also proscribe the retroactive application of a decisional change in criminal law by a court which would work to the disadvantage of the accused.

Ex post facto laws (prohibited by Article], Sections 9 & 10 of the Constitution) generally include a change in the statutory law which in relationship to a criminal offense alters the situation of the accused to his disadvantage. *Thompson v. Utah*, 170 U.S. 343. Both the new serious literary, etc. value test and the new optional definitions of what might be proscribed as depictions of patently offensive hard core sexual

conduct substantially alter the situation of the pre-June 21, 1973 defendant to his obvious disadvantage. In *Bouie* the court said (378 U.S. at 353):

> "Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law such as Art. I § 10 (sic) of the Constitution forbids." (parenthesis and emphasis supplied.)

Bouie followed in *Love v. Fitzharris*, 460 F.2d 382, 385 (9th Cir. 1972), "new court decision making what was lawful when done, a crime *** prohibited by the Constitution."

While not labeled *ex post facto*, the decisions and authorities clearly prohibit a change in the criminal law by court decision which makes criminal that which was not criminal or expands the area of criminal liability by putting an interpretation on a statute which could not have been foreseen or cures a vagueness by that very decision. *James v. United States*, 336 U.S. 213, 221-222; *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Bouie*, supra; *Rabe v. Washington*, supra, at p. 315; 20 Am. Jur. 2d Courts § 236; 51 Virginia Law Review 201, 254.

As previously maintained, the *James* case involved a prosecution for income tax evasion by one Mr. James who had embezzled funds but had not reported them. At the time James failed to report his income a Supreme Court decision in the Wilcox Case, *Commissioner v. Wilcox*, had held that embezzled funds did not constitute income. The Supreme Court held in *James v. United States*, supra, that the element of willfulness could not be proved in a criminal prosecution because James was entitled to rely on the statute with the

gloss placed upon it by Wilcox, and therefore the indictment had to be dismissed.

Shuttlesworth held a subsequent narrowing interpretation which can save a criminal statute cannot be applied retroactively. In *Shuttlesworth* the petitioner was convicted for failing to obtain a permit to have a parade. *Shuttlesworth* was convicted, his conviction was reversed on the grounds that the Birmingham ordinance granted too much discretion to the City of Birmingham in terms of denying parade permits. The highest court of Alabama by decision rewrote the city ordinance and after narrowly construing it, and thus saving it, thereupon reinstated *Shuttleworth's* conviction. The Supreme Court reversed. *Here pertinent,* the Supreme Court held that assuming the Alabama Supreme Court[s rewriting the ordinance was successful (394 U.S. at 155), that *Shuttlesworth* in 1963 could not have had the clairvoyance to foresee the narrowing construction which would ultimately be placed on the statute by the Alabama Supreme Court in 1967 (394 U.S. at 156).

In *Boule,* supra, 378 U.S. at 352, the court in addition to *ex post facto* (though closely allied to it) said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute."

In *Rabe* the Supreme Court of Washington held the motion picture obscene because of the context or location of its exhibition (it was an outdoor theatre). In reversing the Supreme Court said:

"Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged from violation."

The court held no fair notice that criminal liability was dependent upon the place where the film was shown.

51 Virginia Law Review at 254:

"As to judicial changes which expand the substantive criminal law the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal lawmaking, *which demands the same result in any event.*"

The statutory test in the federal obscenity statute for determining what is obscene contains no element of the so-called *Roth-Memoirs* formulation and, none of the new tri-partite *Miller* test. Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's rights and this case should be vacated and remanded.

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS IN CONNECTION WITH THE APPLICATION OF MILLER STANDARDS TO CONDUCT OCCURRING PRIOR TO THE DATE OF THAT DECISION.

See the following:

A. First Circuit

United States v. One Reel of Film ___F.2d ____ (7/16/73)

Held: Title 19 U.S.C. §1305(a) was constitutional on its face. Movie was obscene by both standards (Memoirs and Miller), national standards possibly apply in federal obscenity cases. (Now on Petition for Certiorari to U. S. Supreme Court.)

B. Fourth Circuit

United States v. Brown, ___F.2d.___, (9/18/73)

Held: This case was vacated and remanded to the Fourth Circuit for reconsideration in light of the Miller series of cases. Without allowing counsel any rebriefing or argument, the Circuit Court again affirmed the judgment of conviction without opinion. (Now on Petition for Certiorari to the U. S. Supreme Court.)

C. Fifth Circuit

United States v. Thevis, et al, 484 F.2d 1149 (9/12/73)

Held: That both Miller and Memoirs standards to be applied and appellant given benefit of most liberal viewpoint (this approach avoided ruling on ex post facto argument), although arguing in Cote v. U.S.A 485 F.2d (19/11/73) in footnote 3 that "... with the announcement of Miller and the companion cases of the same date, the Court's 'performance' has taken a significant new turn . . " (Now on Petition for Certiorari to U. S. Supreme Court, No. 73-1075.)

D. Seventh Circuit

United States v. Sians, ____F.2d ____ (7/5/73)

Held: In a case briefed and argued before Miller, June 21, 1973, but decided on memorandum order of July 5, 1973, the Court affirmed the conviction applying Miller standards to pre-Miller conduct. (Now on Petition for Certiorari to U. S. Supreme Court, No. 73-584.)

E. Ninth Circuit

An apparent conflict appears in the decisions of varicus panels in this Circuit:

(1) U.S.A. v. Hamling, et al, 481 F.2d 307 (6/7/73)

Held: Pre-Miller ruling issued June 7, 1973 and challenged by counsel on

Petition for Rehearing raising arguments herein was affirmed by a denial of Petition without comment on 8/23/73. (Now on Petition for Certiorari to the U. S. Supreme Court, No. 73-507.)

(2) U.S.A. v. Henson, et al, ___ F.2d ___ (10/5/73), No. 73-2063

Held: Appellant's pre-Miller conduct governed by Roth-Memoirs standards. Said standards are unconstitutionally vague, conviction reversed. (Pending hearing en banc.)

F. Tenth Circuit

U.S.A. v. Friedman, ___ F.2d ___ (12/11/73), Nos. 72-1143 & 1144

Held: Reversed and remanded back to district court to re-examine facts and determine standards to be applied in any new trial, as well as a determination of applicable community (national or otherwise). (Now pending on government's Petition for Rehearing.)

CONCLUSION

For the reasons suggested herein, as well as those contended in the Petition for Certiorari filed by separate petitioner Michael G. Thevis in case No. 73-1075, the arguments of which are incorporated herein by reference as though more fully set out herein, it is respectfully prayed that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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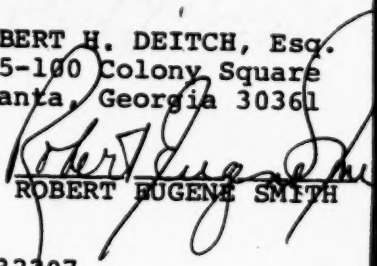
By: 
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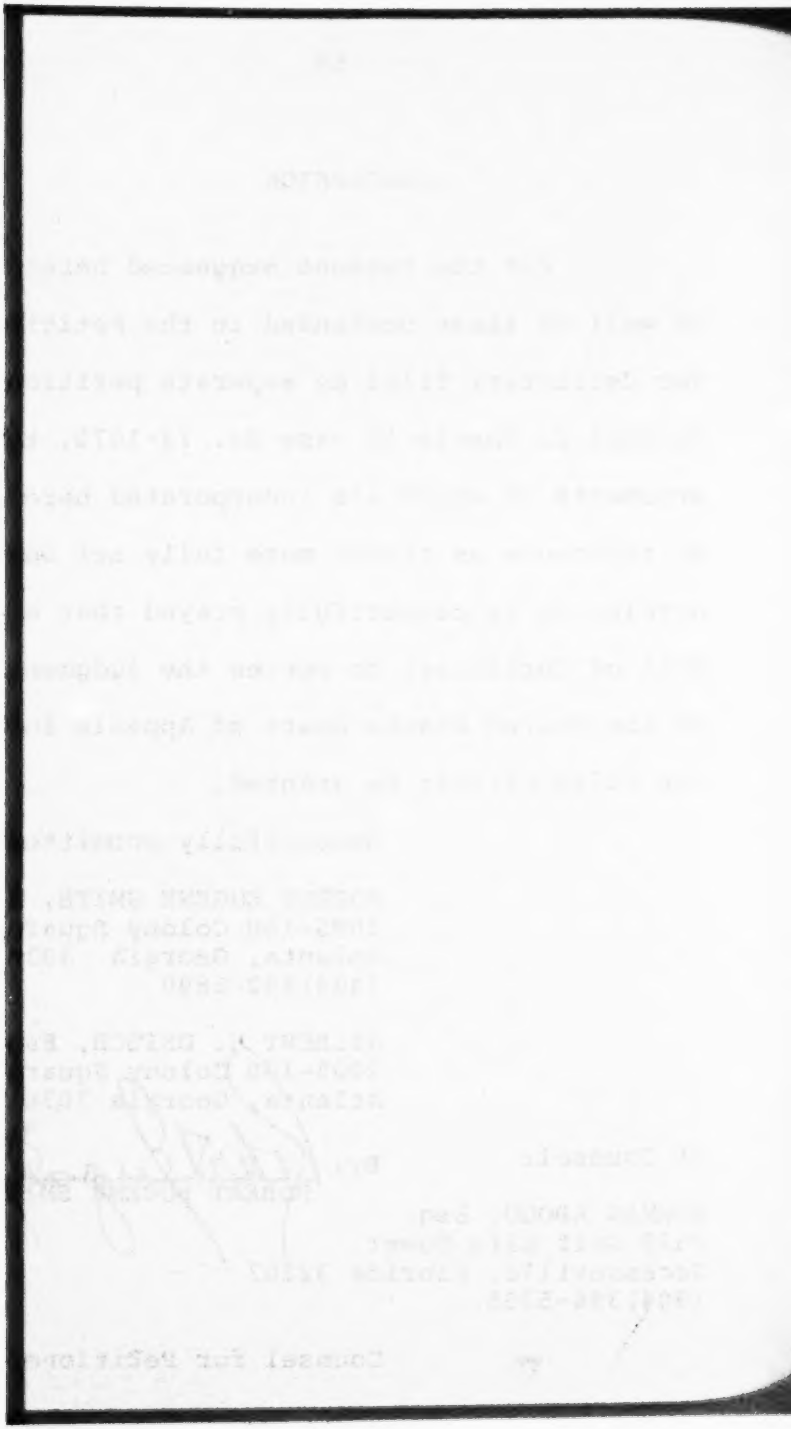

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the within and foregoing Petition for Writ of Certiorari was served by United States Mail with sufficient postage affixed to ensure delivery to JOHN BRIGGS, Esquire, United States Attorney for the Middle District of Florida and ROBERT KEEFE, Special Attorney with the Department of Justice, Washington, D. C. (three copies).

This 10th day of January, 1974.

ROBERT EUGENE SMITH

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2614

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL G. THEVIS and
PEACHTREE NEWS COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(September 12, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

BELL, Circuit Judge: Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 USCA, § 1462.[1] Jury trial was waived.

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[1] 18 USCA § 1462 (1966):

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses

The subject matter of each count was a particular magazine and appellants were convicted on each of the counts. The district court found that the material in question, i.e., each magazine, was obscene under the three-pronged test of *Memoirs*.[2] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. *Redrup v. New York*, 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing

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any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense. . . .

[2] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

that they were obscene in the constitutional sense; (4) that 18 USCA, § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient to support the lower court's finding on the issue of obscenity *vel non*. We will treat these two elements as separate assignments of error.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First Amendment. *Miller v. California*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed 2d 419, 432; *Paris Adult Theatre I v. Slaton*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 446; *United States v. Orito*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 513; *Kaplan v. California*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed. 2d 492; *12 200-Ft. Reels of Super 8 mm Film*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of

the new standard would be violative of the Ex Post Facto clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 USCA, § 1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller*, that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to test the materials for obscenity under any standard. We reject this broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We reserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

Appellants' first assignment of error is that the materials in question should not be tested under a stand-

ard as restrictive of pornography[3] as *Memoirs*. Rather they urge a standard arguably suggested in *Redrup v. New York*, supra, requiring for a finding of obscenity that the materials be distributed to non-consenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*. ____ U.S. at ____, 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such a marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Finally, we note that the origin of the "pandering" concept is *Ginzburg v. United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467-76.

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[3]"Pornography" derives from the Greek (*porne'*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

Appellants' second argument is that the indictment, which tracked the wording of 18 USCA, § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; *Downing v. United States*, 5 Cir., 1965, 348 F.2d 594, 599. See also *Esperti v. United States*, 5 Cir., 1969, 406 F.2d 148; *Bland v. United States*, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*. Further, in *Roth* the Court held that the words used in 18 USCA, § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

Appellants' third contention deals with the scienter necessary for conviction under 18 USCA, § 1462. Ap-

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[4]*Roth v. United States*, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

[5]The sufficiency of an indictment tracking the words of 18 USCA, § 1462 was challenged in *United States v. Luros*, N.D. Iowa, 1965, 243 F.Supp. 160, *rev'd on other grounds*, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-67.

pellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on *Smith v. California*, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in *Rosen v. United States*, 1896. 161 U.S. 29, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: *United States v. West Coast News Company*, 6 Cir., 1956, 357 F.2d 855, *rev'd on other grounds, Aday v. United States*, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; *Schindler v. United States*, 9 Cir., 1953, 208 F.2d 289. See also *Kahm v. United States*, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad

because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from *Stanley v. Georgia*, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by *United States v. Thirty-Seven Photographs*, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and *United States v. Reidel*, 1971, 402 U.S. 351, 91 S.Ct. 1400, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by *United States v. Orito*, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in *United States v. Groner*, 1973, ____ F.2d ____ (En banc) [No. 71-1091, Slip Opinion dated May 22, 1973], that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in *Paris Adult Theatre I v. Slaton*, supra, ____ U.S. at ____, 37 L.Ed.2d at 456. See also *Kaplan v. California*, supra, ____ U.S. at ____, 37 L.Ed.2d at 498.

II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

> "(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," (citations omitted)
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and
>
> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito*, supra, and *12 200-Ft. Reels*, supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment

incursions, the *Miller* standard requires that regulatory statutes define specific sexual conduct to whose depiction or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 USCA, § 1462 are subject to such construction. See *12 200-Ft. Reels*, supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,[6] the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of *Kaplan v. California*, supra, (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

We decline to read so much into *Miller*. Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be re-examined in light of its clarification of previous standards and its declaration of

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[6]Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ___ U.S. at ___, 37 L.Ed.2d at 435.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs* because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller*, ___ U.S. at ___, 37 L.Ed. 2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.*, at ___, 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which

the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller*. Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", *Jacobellis v. Ohio*, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; *United States v. Groner*, 5 Cir., 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by *Miller v. United States*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See *Miller v. United States*, 9 Cir., 1970, 431 F.2d 655.

Therefore, before we consider the question of obscenity *vel non*, and because we do apply the *Miller* standard, we must address ourselves to the question wheth-

er 18 USCA, § 1462 can satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd, lascivious, or filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12 200-Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller*. . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute

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[7]We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

[8]These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretary functions, and lewd exhibitions of the genitals."

Miller, ——— U.S. at ———, 37 L.Ed.2d at 431.

the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under *Jacobellis v. Ohio*, supra, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

TABLE I

	Memoirs			*Miller*		
	(a)	*(b)*	*(c)*	*(a)*	*(b)*	*(c)*
Magazine Titles	*Dominant theme, taken as a whole, appeals to a prurient interest in sex*	*Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters*	*Utterly without redeeming social value*	*The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest*	*Patently offensive depiction or description of sexual conduct specifically defined by applicable statute*	*Taken as a whole, lacks serious literary, artistic, political or scientific value*
Boys and Their Male Lovers	Yes	Yes	No	Yes	Yes	Yes
Duo	Yes	Yes	Yes	Yes	Yes	Yes
Domino	Yes	Yes	Yes	Yes	Yes	Yes
Love Knot	Yes	Yes	Yes	Yes	Yes	Yes
Wanton	Yes	Yes	Yes	Yes	Yes	Yes
My Boys	Yes	Yes	Yes	Yes	Yes	Yes
In & Its Nice	Yes	Yes	Yes	Yes	Yes	Yes
Girlfriends	Yes	Yes	No	Yes	Yes	Yes
Pussy Willow	Yes	Yes	No	Yes	Yes	Yes
Arcadia	Yes	Yes	No	Yes	Yes	Yes
Teenage Jaybirds	Yes	Yes	No	Yes	Yes	Yes
Cloud 9	Yes	Yes	No	Yes	Yes	Yes

In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by the *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter. Indeed, the pictures in each instance are the principle content of the magazines and would, standing along, be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

AFFIRMED in part; REVERSED in part.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2614

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL G. THEVIS and
PEACHTREE NEWS COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion Sept. 12, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 15, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

No. 70-72 -Cr-J
(18 USC 1462)

MICHAEL G. THEVIS
PEACHTREE NEWS COMPANY, INC.,
a Georgia corporation

The Grand Jury charges:

COUNT ONE

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 38 copies of magazines entitled "Duo" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TWO

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Boys and Their Male Lovers" from Atlanta,

State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT THREE

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 20 copies of magazines entitled "Domino", Volume 1, Number 1, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT FOUR

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 5 copies of magazines entitled "Love Knot" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT FIVE

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and

PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 5 copies of magazines entitled "Wanton" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT SIX

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 110 copies of magazines entitled "My Boys", Volume 1, Number 1, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT SEVEN

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 5 copies of magazines entitled "In and Its Nice" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville

Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT EIGHT

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: more than 6 copies of magazines entitled "The Girlfriends", Volume 2, Number 2, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT NINE

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Pussy Willow" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TEN

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and

PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Arcadia", Volume 6, Number 2, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT ELEVEN

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Teenage Jaybird", Volume 1, Number 4, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TWELVE

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Cloud 9", Volume 6, Number 3, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street,

PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Arcadia", Volume 6, Number 2, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT ELEVEN

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Teenage Jaybird", Volume 1, Number 4, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TWELVE

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Cloud 9", Volume 6, Number 3, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street,

Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

A TRUE BILL

Robert F. Wyse Jr. Dorough Jr.
FOREMAN

John L. Briggs
JOHN L. BRIGGS
United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1075

MICHAEL G. THEVIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1091

PEACHTREE NEWS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a jury-waived trial in the United States District Court for the Middle District of Florida, petitioners were convicted of twelve counts of interstate transportation of obscene materials in violation of 18 U.S.C. 1462 under guidelines in effect prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15. On each count, Peachtree News Company was fined $5,000 of which payment of $3,500 was suspended (Pet. 13). Petitioner Thevis was sentenced to twelve concurrent terms of five years' imprisonment, of which the court ordered six months

served in a jail-type institution and the remainder suspended, with petitioner to serve five years' probation. In addition, on each count Thevis was fined $5,000, of which payment of $4,000 was suspended (Pet. 5). The court of appeals affirmed as to six counts (Pet. App.).

Petitioners argue that this Court's decision in *Miller* v. *California, supra,* teaches that 18 U.S.C. 1462 was unconstitutionally vague on its face and as applied, at least until *Miller* was decided and Section 1462 was given a limiting construction by *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 130 n. 7.

Counsel for petitioner Thevis, Stanley Fleishman, has made the same arguments to this Court (with respect to 18 U.S.C. 1461) on behalf of William L. Hamling, *Hamling* v. *United States,* No. 73-507, argued April 15, 1974. These contentions are fully discussed in our brief in *Hamling,* No. 73-507.

1. In brief, petitioner first contends that the fact that 18 U.S.C. 1462 did not contain a specific description of lewd sexual conduct, as required by *Miller,* made the statute vague on its face. But prior to *Miller* the federal obscenity statutes were sustained by this Court against vagueness challenges. For example, in *Roth* v. *United States,* 354 U.S. 476, 491, the Court said:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. "* * *[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * *" *United States* v. *Petrillo,* 332 U.S. 1, 7-8. These words ["obscene,"

> "lewd", etc.], applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark "* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *"

Nor did *Miller* and its companion cases suggest that the *Roth-Memoirs*[1] standards rendered the obscenity statutes unconstitutionally vague on their face. See *United States* v. *One Reel of Film,* 481 F. 2d 206 (C.A. 1); *United States* v. *Gordon and Fleisher,* Cr. No. 73-20 (D. Vt., February 20, 1974); *United States* v. *Guarino, et al.,* Nos. 7968, 7970-7972 (D. R.I., November 14, 1973); *United States* v. *Marks,* 364 F. Supp. 1022, 1026 (E.D. Ky.); *United States* v. *Dorfman and Roka Film Enterprises,* Nos. 181-73 and 331-73 (D. D.C., August 31, 1973). Rather, the Court concluded that *Memoirs* imposed greater burdens on the regulation of obscenity than were intended by the *Roth* majority. As the Court stated (*Miller, supra,* 413 U.S. at 21-22):

> While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is *"utterly* without redeeming social value." Thus, even as they repeated the words of *Roth,* the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.,* that the material was *"utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. * * *

This language hardly suggests that the Court would view Section 1462, as construed by *Roth-Memoirs,* to be

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[1] *Roth* v. *United States, supra; Memoirs* v. *Massachusetts,* 383 U.S. 413.

unduly vague. If anything the implication is that the *Roth-Memoirs* construction was unnecessarily strict, thereby depriving the government of constitutionally valid convictions by imposing an "impossible" standard of proof.

Moreover, the *Miller* requirement that obscenity statutes be limited to depictions of sexual conduct specifically described in the statute did not make Section 1462 vague *as applied* to petitioners.

In *United States* v. *12 200-Ft. Reels of Film, supra,* 413 U.S. at 130, n. 7, this Court limited the literal reach of 18 U.S.C. 1462 by construing the statutory terms "obscene", "lewd", etc. to reach only "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California,* * * *." The examples of proscribable representations given in *Miller,* are "[p]atently offensive representations * * * of ultimate sexual acts, normal or perverted, actual or simulated * * * [, and] of masturbation, execretory functions, and lewd exhibition of the genitals" (*Miller, supra,* 413 U.S. at 25). The court below found that each of petitioners' publications fell within those examples (Pet. App. 12-13, Table I).[2] Since petitioners' publications clearly fall within the *Miller* examples, the statute was constitutionally applied to them.

2. Petitioners also contend that the trial court's instruction to the jury to use nationwide standards of obscenity made the statute unconstitutionally vague as applied to them. This contention is also answered in our brief in *Hamling.*

---

[2]"Pet. App." references are to Appendix A of the petition in No. 73-1075.

In brief, we note that in *Miller* the Court observed that at the time of trial a national standard was "correctly regarded" as "controlling" (*Miller, supra,* 413 U.S. at 30). The *Miller* resort to "contemporary community standards" may be viewed as a means of sharpening the fact-finding process of the jury. But it does not follow that all previous fact-finding was constitutionally deficient. There is no reason to assume that juries in pre-*Miller* cases could not and did not determine a workable national standard. Indeed, since *Miller* some courts of appeals have found that national standards are still ascertainable and appropriate in federal cases. In *United States* v. *Palladino,* No. 72-1005, decided January 7, 1974, slip op., p. 8, the First Circuit stated a preference for a national standard, then added:

> All this is not to say that evidence of national standards of prurient appeal and patent offensiveness will be unmarred by serious dispute. But neither can we say that such evidence will never be clear * * *. And the effort to identify a national standard of tolerance would seem to differ only in degree from the effort, upheld in *Miller* to identify a statewide standard in such a large, populous, and variegated state as California.

Our submission is that the use of a national standard of obscenity, at least when supported (as it was here) by expert testimony, was not too vague for the jury to grasp and apply. (See generally, Brief of the United States in No. 73-507, pp. 25-31).

3. Petitioners finally contend that the indictment—framed in statutory language—was insufficient and that the government should have been required to prove that the petitioners knew that their publications were obscene. These contentions are also answered in our brief in

Hamling (See Brief for the United States, in No. 73-507, pp. 34-37 and 43-51) and by the court below. The court below said (Pet. App. 5-6):

> Appellants' second argument is that the indictment, which tracked the wording of 18 U.S.C.A. § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:
>
> > "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."
>
> *United States* v. *Farabee,* 5 Cir., 1969, 411 F. 2d 1210, 1211; *Downing* v. *United States,* 5 Cir. 1965, 348 F. 2d 594, 599. See also *Esperti* v. *United States,* 5 Cir., 1969, 406 F. 2d 148; *Bland* v. *United States,* 5 Cir., 1962, 299 F. 2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth* and *Memoirs.* Further, in *Roth* the Court held that the words used in 18 U.S.C.A. § 1462 are sufficiently precise to avoid the due process vice of vagueness. [Footnotes omitted.]
>
> Appellants' third contention deals with the scienter necessary for conviction under 18 U.S.C.A. § 1462. Appellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

> * * * [In *Smith* v. *California,* 361 U.S. 147] [a]pparently the Court did not disturb its holding in *Rosen* v. *United States,* 1896, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: *United States* v. *West Coast News Company,* 6 Cir., 1966, 357 F. 2d 855, rev'd on other grounds, *Aday* v. *United States,* 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed. 2d 1309; *Schindler* v. *United States,* 9 Cir., 1953, 208 F. 2d 289. See also *Kahm* v. *United States,* 5 Cir., 1962, 300 F. 2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

For the foregoing reasons, we believe that the decision of the court of appeals is correct. Since these issues are presently pending in *Hamling,* however, we suggest that the Court should defer action on these petitions until *Hamling* is decided, and then dispose of them in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

FILE COPY

FILED
MAY 3 1974

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1075

MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States' Court of Appeals for the Fifth Circuit.

Petitioner's Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari.

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Petitioner's Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari.

1. In the Petition for a Writ of Certiorari, petitioner argued that Title 18 United States Code §1462, on its face and as construed and applied to petitioner's pre-*Miller* conduct, is unconstitutionally vague because the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973 the statute had not received an authoritative construction reading the necessary terminology into the statute.

The Government, relying on *Roth,* denies that §1462 is vague on its face. [Memo. for U.S., 2-3]. The Government ignores the fact that the author of *Roth* has now come to the conclusion that "the approach initi-

ated 15 years ago in *Roth* . . . and culminating in [the June 21, 1973 decisions] cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values. . . ." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (Brennan, J., dissenting). In concluding that the obscenity statutes—federal and state—are unconstitutionally vague, Justice Brennan stated: "As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts."

The court below recognized that §1462, on its face, failed to meet the due process requirements of *Miller*. "On its face, this statutory terminology ('obscene, lwed, lascivious, or filthy') does not contain the specifics required by *Miller*. . . . *Miller* requires that elements of the definition be a part of the statute." *United States v. Thevis*, 484 F.2d 1149, 1155 (5 Cir. 1973).

Nevertheless, the Government insists that the naked words of §1462 meet the requirements of *Miller*. The Government is plainly in error.

In *Commonwealth v. Horton*, ... Mass. .... (No. N-15,261, April 23, 1974),[1] the Massachusetts Supreme Judicial Court examined its obscenity statute and concluded that it was unconstitutionally vague, in light of *Miller*. The Massachusetts statute, like §1462, utilizes the tired words "obscene, indecent", etc. Justice Wilkins, speaking for the court, held that these words, standing alone, were plainly constitutionally insufficient. Justice Wilkins also concluded that the Massachusetts statute had not received an authoritative construction "in a way which has 'specifically defined' the sexual conduct

[1]A copy of the opinion is attached as APPENDIX A.

whose portrayal is barred by the statute". Accordingly, he continued, "the opportunity is not fairly available to us . . . to conclude that the constitutional requirements of specificity have been met by our decisions prior to the *Miller* decisions." *Horton* not only held that the Massachusetts obscenity statute was unconstitutional as applied to pre-*Miller* conduct, but also held that the statute was unconstitutional as applied to post-*Miller* conduct. "We decline to undertake now to furnish, even on a prospective basis, a judicial interpretation of that sexual conduct which § 28A provides should not be portrayed. To do so would require us to engage in a function which we . . . have been traditionally reluctant to perform." The court declined "further to engage in the function of saving judicially a statute which is of great ambiguity on its face".

The task of writing an obscenity statute, the court said, was for the Legislature, not the Judiciary. ". . . [I]f there is to be regulation in the Commonwealth in the area of the sale or showing of pornographic works to adults, it must be achieved by explicit new legislation." The court stated that the Legislature is in a better position than the court to deal with the subject comprehensively. The Legislature might conclude, the court said, "that the expense in time and funds does not warrant enforcement of constitutionally permissible restraints in all instances."

Justice Hennessey, concurring, also emphasized that the Constitution requires specificity in an obscenity statute and that the Massachusetts statute clearly "contains no such specifics in its wording". He stated that for some 17 years, "confusion has reigned as to the validity and effectiveness of obscenity statutes. . . . Upholding the statute here through what could only be imper-

missible and excessive straining on our part might add . . . unnecessary uncertainty and confusion. . . ." Justice Hennessey stated that it was a legislative option to "determine whether the Commonwealth should or should not have a new obscenity statute or statutes."

Justice Hennessey rejected the Commonwealth's argument—also made by the Government herein—that the conviction should be affirmed because the publications were "hard-core pornography" and obscene under any standard. The phrase "hard-core pornography", he said, "is little more than a cliché which has not been defined in any case, nor has it apparently been a premise for the affirmation of even one judgment of guilt."

Justice Hennessey took note of the "abundant empirical evidence that the community has tolerated increasingly permissive displays of pornographic literature and X-rated movies". Finally, Justice Hennessey suggested that *Miller* is "probably transient."[2] In the area of constitutional-criminal law, Justice Hennessey said, "all concerned are entitled to a substantial measure of stability and predictability."

Justice Kaplan, concurring, agreed that the "tired words" of the Massachusetts statute do not have the "magical property" necessary to save it from constitutional infirmity. Justice Kaplan went on to state that "[p]ersons with a reflective or experimental turn of mind might welcome an opportunity to observe how New England communities would carry on over a period of time without the assistance of suppressing law." Jus-

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[2]In oral argument in *Hamling, et al. v. United States*, No. 73-507, Mr. Justice Brennan said: "Is it possible, Mr. Tuttle, that all this discussion suggests that perhaps *Miller* is not the last word in the definition of obscenity?"

tice Kaplan expressed the view that under the Massachusetts Declaration of Rights the Commonwealth might be "without power to intrude on the choice of an adult who knowingly and willingly seeks a pornographic work. . . . If this view should prevail, our courts would be relieved of the anomalous duty of serving as literary and artistic constables, and the Commonwealth would be spared the phenomenon of judges (very few of them women) trying as official censors to assess the incitive or emetic qualities of movies or books that a considerable fraction of the population, pursuing their own tastes, desire to see or read. The reallocation of judicial resources to tasks that judges are better schooled to handle might be thought to be in itself a distinct gain."

Commonwealth v. Horton applied the teachings of this Court in *Smith v. Goguen*, 414 U.S. ...., 94 S.Ct. 1242, where the Massachusetts flag desecration statute was declared unconstitutionally vague. Justice Powell, speaking for the Court, stated that the due process doctrine of vagueness "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'. Where the statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." In *Smith v. Goguen*, the Court found that the statutory language "publicly . . . treats contemptuously the flag of the United States . . ." could reach protected speech. Because at the time of the charged conduct the statute was "without the benefit of judicial clarification", it was stricken on grounds of vagueness.

Justice Powell noted that the statute was attacked on vagueness grounds because "[w]hat is contemptuous to one man may be a work of art to another."[3] In light of the "widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag", the statutory language was found inadequate "to draw reasonably clear lines" between criminal and non-criminal treatment of the flag. "Given today's tendencies to treat the flag unceremoniously", the statute fails to satisfy the standards of due process. In *Goguen*, the Court found that the statute violated the due process requirement "that a legislature establish minimal guidelines to government law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies. . . . Statutory language of . . . a standardless sweep allows policemen, prosecutors and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." The Court stated that because flag contempt "takes so many forms changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw."

The Court's reasoning in *Smith v. Goguen* has special relevance to the case at bar. All that was said about the vagueness of the Massachusetts "flag contempt" statute is equally applicable to the federal obscenity statute at bar here.

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[3]For many years, it has been recognized that "what is obscene to one man may be a work of art to another."

2. In *United States v. Reidel,* 402 U.S. 351, 357, Justice White, in a postscript, stated:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity law lies with those who pass, repeal, and amend statutes and ordinances. *Roth* and like cases pose no obstacle to such developments."

Since §1462 is deficient on its face, the Legislature, and not this Court, should undertake the task of "restructuring the obscenity laws".

3. Since the Government relies on its Brief in *Hamling, et al. v. United States,* No. 73-507, to answer petitioner's other contentions, petitioner herein similarly relies on the petitioners' Briefs in *Hamling* as well as on his Petition for a Writ of Certiorari herein.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner
Michael G. Thevis.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Commonwealth vs. George C. Horton (and a Companion Case[1]).

WILKINS, J. The defendant Horton, an employee in a Quincy bookstore, was indicted for the sale in August, 1971, of "certain obscene and impure magazines entitled 'Love Theme' and 'Young Stuff.'" The defendant O'Brien, the owner of the bookstore, was indicted on the same day for possession of "certain obscene, indecent, or impure magazines . . . [the same magazines] with intent to sell [them]." The cases were tried together in May, 1972, and the defendants were found guilty. Each defendant was placed on probation for one year; O'Brien was fined $1,000.

The defendants claimed various exceptions at trial but have argued before us, in connection with their motion for directed verdicts, only that G. L. c. 272, § 28A,[2] is unconstitutionally vague and overbroad and that it would be unconstitutional for this court now to construe § 28A so as to be applicable to acts committed by them in 1971. Basically the defendants argue that § 28A does not satisfy the First Amendment stand-

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[1]*Commonwealth vs. Richard O'Brien.*

[2]General Laws c. 272, § 28A, as appearing in St. 1959, c. 492, § 2, reads as follows: "Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction."

ards prescribed in *Miller v. California,* 413 U.S. 15 (1973), decided on June 21, 1973; that our decisions have not interpreted § 28A so as to meet the constitutional requirements set forth in the *Miller* case; and that it would be improper for this court now to interpret § 28A retroactively so as to import into § 28A that specificity which under the *Miller* case must exist either in the words of the statute or in authoritative judicial construction of the statute. *Miller v. California, supra,* 24.

The defendants were tried under the so called *Roth-Memoirs* standard. *Roth v. United States,* 354 U.S. 476 (1957). *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.,* 383 U.S. 413 (1966). That standard required three elements to be established in order to obtain a constitutionally justified obscenity conviction. The prosecution had to establish that "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass., supra,* 418.

No Justice of the United States Supreme Court now endorses the *Roth-Memoirs* test as the measure of First Amendment protection in obscenity cases. See *Miller v. California, supra,* 23; *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 73 (1973) (Brennan, J., dissenting). A bare majority of those Justices have arrived at a new set of basic guidelines. Those guidelines are intended to define the permissible scope of State statutes designed to regulate works which depict or describe sexual con-

duct. *Miller v. California, supra,* 24.[3] The applicable State law, "as written or authoritatively construed," must specifically define the sexual conduct whose depiction or description is interdicted. *Miller v. California, supra,* 24. The new basic guidelines, which also set forth a three-pronged test, call for the trier of fact to determine "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Emphasizing that it is not its function to propose regulatory schemes for the States, the court gave "a few plain examples" of what a State statute could define for regulation under part (b) of the new guidelines.[4]

Applying the *Miller* standards to G. L. c. 272, § 28A, it is manifest that § 28A does not define the sexual conduct whose display or description is intended to be prohibited. The *Miller* opinion, however, recognizes that authoritative judicial construction of an obscenity statute may fulfill the constitutional requirement that the State law specify that sexual conduct which is pro-

---

[3]We note that the four dissenting Justices would extend First Amendment protection to the publications involved here, which were sold to consenting adults. *Miller v. California, supra,* 37 (Douglas, J., dissenting). *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 73, 113 (1973) (Brennan, J., dissenting, joined by Stewart and Marshall, JJ.).

[4]The examples given are (*Miller v. California, supra,* 25): "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

hibited. Some State courts in post-*Miller* decisions have been able to sustain obscenity statutes by concluding that previous judicial construction of the applicable statute has already provided the specificity required by the *Miller* case.[5] Other decisions have read into the applicable obscenity statute those definitions of specific sexual conduct which appear in the *Miller* opinion (see fn. 4 above).[6] Some of the decisions upholding

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[5]*Rhodes v. State*, 283 So. 2d 351, 355-356 (Fla. 1973). *State ex rel. Wampler v. Bird*, 499 S. W. 2d 780, 784 (Mo. 1973). *People v. Heller*, 33 N. Y. 2d 314, 327, 329 (1973). *State ex rel. Keating v. A Motion Picture Film Entitled "Vixen,"* 35 Ohio St. 2d 215 (1973). *Price v. Commonwealth*, ... Va. .... (1974) (14 Cr. L. Rep. 2379 [1974]). *People v. Enskat*, 33 Cal. App. 3d 900, 908 (1973), cert. pending sub nom. *Enskat v. California*, (March 19, 1974) 42 U. S. L. Week 3526. See *Jenkins v. State*, 230 Ga. 726 (1973), probable jurisdiction noted (December 10, 1973) 42 U. S. L. Week 3351.

Note is taken of the decision of the Appeals Court in *Commonwealth v. Claflin*, ... Mass. App. Ct. .... (1973) .... (Mass. App. Ct. Adv. Sh. [1973] 475), decided on July 11, 1973, although argued prior to the decision in the *Miller* case. The *Claflin* case was decided on the *Roth-Memoirs* standard. The Appeals Court noted that the defendant did not request an opportunity for further brief or argument on the effect of the *Miller* case on his claim that G. L. c. 272, § 28A, was unconstitutional. Nor did the defendant seek further appellate review here.

[6]State cases: *Gibbs v. State*, ... Ark. .... (1974) (504 S. W. 2d 719 [1974]). *State v. J-R Distribs. Inc.* .... Wash. 2d. ...., (1973) (512 P. 2d 1049, 1060 [1973]), cert. pending sub nom. *J-R Distribs. Inc. v. Washington*, (December 17, 1973) 42 U. S. L. Week 3391. *West v. State*, ... S. W. 2d .... (Tex. Crim. App. 1974) (14 Cr. L. Rep. 2479 [1974]). See *State v. Welke*, ... Minn. .... (1974) (14 Cr. L. Rep. 2498 [1974]) (*Miller* standard said to be applicable but not retroactively).

Federal cases: *United States v. 12 200-Ft. Reels of Super 8 MM. Film*, 413 U.S. 123, 130 (fn. 7) (1973). This opinion was issued on the same day as the *Miller* opinion, incorporated the *Miller* description of specific prohibited sexual conduct (see fn. 4 above), and thus set the pattern for lower Federal Court opinions dealing with the confiscation of obscene matter in interstate and foreign commerce. See *United States v. One Reel of Film*, 481 F. 2d 206, 209 (1st Cir. 1973); *United States v. One Reel of 35 MM Color Motion Picture Film Entitled*

State obscenity statutes have been made in the face of forceful dissents.[7] Other courts, fewer in number, have declined to provide a judicial rescue for statutes which by their terms failed to meet the *Miller* requirement of specificity.[8] The basic question here is what course this court should now follow.

In the absence of any legislative redefinition of obscenity, persons concerned about the application to them of Massachusetts obscenity statutes have been

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"Sinderella," Sherpix, Inc. .... F. 2d .... (2d Cir. 1974) (N. Y. L. J. February 27, 1974, p. 1 [decided February 11, 1974]). Compare *United States v. Thevis*, 484 F. 2d 1149, 1155 (5th Cir. 1973), cert. pending sub nom. *Thevis v. United States*, (January 8, 1974) 42 U. S. L. Week 3407 (a criminal prosecution).

[7]*Jenkins v. State, supra*, 230 Ga 726, 737 (1973). *State ex rel. Wampler v. Bird, supra*, 499 S. W. 2d 780, 784 (Mo. 1973). *People v. Heller*, 33 N. Y. 2d 314, 334, 338 (1973). *State v. J-R Distribs. Inc., supra*, ... Wash. 2d at .... (1973) (512 P. 2d at 1088, 1090 [1973]).

[8]*Stroud v. State*, ... Ind. .... (1973) (300 N. E. 2d 100 [1973]). *State v. Wedelstedt*, 213 N. W. 2d 652 (Iowa 1973). *State v. Shreveport News Agency, Inc.*, 287 So. 2d 464 (La. 1973). *Art Theater Guild, Inc. v. State*, ... Tenn. .... (1974) (14 Cr. L. Rep. 2498 [1974]). In the *Stroud* case the Supreme Court of Indiana dealing with an obscenity statute as general as ours (Ind. Sts. Anno. §10-2803 [Burns 1973 supp.]) ordered the defendant to be discharged because the statute was "too general in nature and does not set out specifically the sexual or obscene acts which . . . constitute a violation of the statute." .... Ind. at .... (1973) (300 N. E. 2d at 101 [1973]). The brief unanimous opinion did not discuss the possibility of saving the statute by judicial construction. In the *Shreveport News Agency* case, the Supreme Court of Louisiana (three Justices dissenting) said that "it would be an unconstitutional usurpation of the legislative function for us to engraft these limiting two examples [referring to the examples in the *Miller* opinion quoted in fn. 4 above] into a broad, general statute. . . ." 287 So. 2d at 470 (La. 1973). For Federal opinions declaring or suggesting the unconstitutionality of State obscenity statutes, see *Hamar Theatres, Inc. v. Cryan*, 365 F. Supp. 1312 (D. N. J. 1973), cert. pending sub nom. *Cryan v. Hamar Theatres, Inc.* (December 18, 1973) 42 U. S. L. Week 3365; *Detco, Inc. v. McCann*, 365 F. Supp. 176, 178 (E. D. Wis. 1973).

obliged in recent years to gauge the legality of their intended conduct by First Amendment standards expressed by, or anticipated from, the Supreme Court of the United States.[9] During a time when First Amendment rights were expanding so as to reduce the scope of what might constitutionally be regulated as obscene, the application of new standards was not unfair to those affected by obscenity laws and no serious constitutional problems of "vagueness" were raised. We believe, however, that with the *Miller* decision the situation has changed.

In at least one material respect the *Miller* case reduces the area of First Amendment protection from that existing under the *Roth-Memoirs* test.[10] Under

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[9]The treatment of this court's interpretation of Massachusetts obscenity laws by the Supreme Court of the United States has not been one of warm embrace. See, e.g., *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.* 383 U. S. 413 (1966), revg. *Attorney Gen. v. "John Cleland's Memoirs of a Woman of Pleasure"*, 349 Mass. 69 (1965). In turn, decisions of this court have, often with expressed reluctance (see, e.g., *Commonwealth v. Palladino*, 358 Mass. 28, 32 [1970]; *Commonwealth v. Donahue*, 358 Mass. 803 [1970] [rescript]; *Commonwealth v. Bitsocos*, ... Mass. .... [1972] [Mass Adv. Sh. (1972) 641] [rescript]), acceded to the First Amendment views of the Supreme Court of the United States with the result that our obscenity statutes have been treated here as being as broad in scope as the Supreme Court of the United States will permit them to be under the First Amendment as applied to the States under the Fourteenth Amendment. This circumstance has meant in effect that the application of our obscenity statutes has been regulated by the majority views of the Justices of the United States Supreme Court (see *Attorney Gen. v. "Tropic of Cancer,"* 345 Mass. 11, 21, 22 [1962]), even to the point of this court's reinterpreting the appropriate sections of G. L. c. 272 as of the date of specific Supreme Court opinions. See *Attorney Gen. v. "Naked Lunch,"* 351 Mass. 298, 300 (1966).

[10]Perhaps in other respects the standards of the *Miller* case are not significantly different from the comparable standards of the *Roth-Memoirs* test, although further refinements of the *Miller* standards may in time reveal differences which will show that in other respects the *Miller* test reduces areas of permissible conduct under the First Amendment.

the *Roth-Memoirs* standard there had to be an affirmative showing that the materials were "utterly without redeeming social value." See *Jacobellis v. Ohio,* 378 U.S. 184 (1964); *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass,* 383 U.S. 413 (1966). Under the *Miller* test the work must lack "serious literary, artistic, political, or scientific value." Today a work not utterly without social value but of less than serious literary, artistic, political, or scientific value may be prohibited as obscene, whereas before it could not.[11]

A review of our decisions indicates that we have not authoritatively construed § 28A in a way which has "specifically defined" the sexual conduct whose portrayal is barred by statute. Certainly our decisions fall far short of the degree of definitiveness appearing in statutes in Oregon and Hawaii, whose definition of prohibited conduct was at least qualifiedly endorsed in the *Miller* opinion (*supra,* 24, fn. 6). Our decisions also fall far short of the "plain examples" given in the *Miller* opinion (see fn. 4 above). The most we have ever said was said in a negative way in a rescript opinion complying with what we viewed as the requirements of the Supreme Court of the United States. See *Common-*

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[11]Paradoxically, in this respect, the third *Miller* element (clause [c]) is close to the view expressed by this court in *Attorney Gen. v. "John Cleland's Memoirs of a Woman of Pleasure," supra,* at 73, in assessing the requirements of the *Roth* case that the work be "utterly without redeeming social importance." We said there that "[w]e do not interpret the 'social importance' test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene." That view was rejected, of course, on appeal by the Supreme Court of the United States, *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.,* 383 U.S. 413 (1966). If it had not been, arguably the problem with which this court is now confronted would not have arisen.

wealth v. Donahue, 358 Mass. 803 (1970) ("[n]one of the pictures, however, explicitly portrayed copulation or other sexual congress"). See also *Commonwealth v. Palladino,* 358 Mass. 28, 32 (1970), and *Commonwealth v. Bitsocos,* .... Mass. .... (1972),[a] for even more general characterizations in the same vein.[12] The opinion in the *Donahue* case was not designed as an authoritative construction of our statute (G.L. c. 272, § 28A) so as to provide a definition of proscribed sexual conduct. The Court of Appeals for the First Circuit was correct in indicating in *Literature, Inc. v. Quinn,* 482 F. 2d 372, 375 (1973), that this court has not "specifically defined" (see *Miller v. California, supra,* at 24) those activities which under § 28A may not be depicted or described. It is therefore clear that the opportunity is not fairly available to us, as it was in certain other States (see fn. 5 above), to conclude that the constitutional requirements of specificity have been met by our decisions previous to the *Miller* decision.[13]

We decline to undertake now to furnish, even on a prospective basis, a judicial interpretation of that sexual conduct which § 28A provides should not be portrayed. To do so would require us to engage in a function which we, perhaps more than many courts, have been

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[a]Mass. Adv. Sh. (1972) 641.

[12]In each of these three cases the material involved was held not to be obscene because the Supreme Court of the United States had extended First Amendment protection to publications which, although portraying sexually provocative poses, did not portray sexual congress or other hard core pornography.

[13]Although it is not the ground of our decision and is alluded to only parenthetically in the defendants' brief, the pictures in the two magazines which were the basis of these prosecutions do not explicitly portray sexual congress. In many pictures sexual congress of some sort appears imminent; indeed in some it seems virtually inevitable; and in others it is at most implicit, obscured because of the angle of the picture.

traditionally reluctant to perform. It is true that, despite traditional reluctance, this court has for many years undertaken to protect such vestiges of our obscenity statutes as it could from the erosion of waves of constitutional onslaught. In doing so we have suggested that our obscenity statutes apply as far as the Federal Constitution may permit. That itself has been a standard of some uncertainty, subject to abrupt change, as the *Miller* case so clearly shows. It may seem strange that we appear to have abandoned the struggle just as the tide may have turned. It is, however, for that very reason that we decline further to engage in the function of saving judicially a statute which is of great ambiguity on its face. The abandonment of the *Roth-Memoirs* test has removed the basis upon which this court has attempted to save § 28A by judicial construction.

People are entitled to know what they may or may not do under the threat of imprisonment or fine. Our general obscenity statute does not furnish any guidance. As previously indicated, we decline to undertake the task of trying to list the specific sexual conduct whose display or description § 28A proscribes. To do so would constitute a judicial rewriting of that statute. Thus if there is to be regulation in the Commonwealth in the area of the sale or showing of pornographic works to adults, it must be achieved by explicit new legislation.[14]

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[14]The Legislature can deal with the subject comprehensively. Unlike this court, the Legislature is in a position to define prohibited conduct so as to permit the display or description of activity which could be constitutionally prohibited. It may conclude that the expense in time and funds does not warrant enforcement of constitutionally permissible restraints in all instances. It can deal with the question whether the "community" whose standards are to be used by the trier of fact should be a

(This footnote is continued on next page)

We do not see any rational basis for treating violations allegedly committed (or a case tried) before the *Miller* decision, as is the situation here, differently from those taking place after that decision. In each instance § 28A is constitutionally inadequate. Thus, although the defendants may well have had an error-free trial under the law as it existed at the time of trial, we must apply Federal constitutional principles as established by the Supreme Court of the United States at the time a case is decided by us. See *Attorney Gen. v. "Tropic of Cancer,"* 345 Mass. 11, 18 (1962); *Linkletter v. Walker,* 381 U.S. 618, 622, 627 (1965).

One cautionary note should be given concerning what we have not decided. Speaking generally, G. L. c. 272, § 28, deals with actual or intended sales, exhibitions, or distributions of certain material harmful to minors. The words "harmful to minors" have an explicit statutory definition, expressed somewhat along the pattern of the *Roth-Memoirs* test. Such an explicit description of prohibited conduct obviously does not suffer from the same lack of specificity found in G. L. c. 272, § 28A, when tested by the standards of the *Miller* decision. Our decision should not, therefore, be

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State-wide or localized community. Such a consideration is permissible because the "national" standard of First Amendment protection has been abandoned in the *Miller* case. See *Miller v. California, supra,* 30-34. If this court were to undertake, in the guise of construing our obscenity statutes, to define the geographical boundaries of the "community" whose contemporary standards are to apply under the *Miller* case, it would plainly be involved in a "rewriting" of those statutes. In addition, legislative determinations can have a prospective application, whereas a judicial determination, as to the meaning of a statute, normally would not.

construed as expressly or impliedly rendering unenforceable the statute concerned with the furnishing of obscene material to minors.[15]

From what we have said it is apparent that the defendants are the fortuitous beneficiaries of the consequencies in this Commonwealth of the decision of the Supreme Court of the United States in the *Miller* case.

Exceptions sustained.

Note: Chief Justice Tauro and Justices Hennessey and Kaplan join in the preceding majority opinion, and in the majority opinion in the cases *Commonwealth v. Capri Enterprises, Inc.* and *Essex Theatre Corporation v. Police Commissioner of Boston,* decided April 23, 1974.

HENNESSEY, J. (concurring). I concur as to both result and reasoning with the opinion of the court as expressed by Justice Wilkins. The United States Supreme Court, in the *Miller* case, ruled that the Constitution requires specificity in an obscenity statute. More particularly, the relevant sexual conduct must be specifically defined either in the wording of the statute or by authoritative judicial construction of the statute. Clearly G. L. c. 272, § 28A, contains no such specifics

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[15]General Laws c. 272, § 28, as appearing in St. 1966, c. 418, § 1, defines "harmful to minors" to include, among other things, a "quality of description or representation of nudity, sexual conduct or sexual excitement which . . . is utterly without redeeming social importance for such minors." This standard, as the *Miller* case indicates, may be more generous than the Constitution requires. If this court had incorporated the *Miller* case standards into the State's general obscenity statute (i.e., lacking "serious literary, artistic, political, or scientific value"), arguably it could have produced the anomalous result that pornographic material having some "social importance" but not "serious" value could be distributed to minors under § 28 but not to adults under § 28A.

in its wording. Nor have we authoritatively construed the statute. The few Supreme Judicial Court cases relied on in the dissent in *Commonwealth v. Capri Enterprises, Inc., post,* ....,[a] contain only cursory, and at best ambiguous, reference to proof under the statute. Just as important, until the *Miller* case established a rule of community standards, everything that we said about our statute had to be read in the context of national standards of First Amendment protection. These national standards in turn have been so vaguely defined as to foreclose any authoritative construction of a local obscenity statute.

Every appeal deserves our most careful consideration, but there is an added and special importance in our reaching the correct results in this decision, the *Capri* case, *supra,* and *Essex Theatre Corp. v. Police Commr. of Boston, post,* .....[b] For about seventeen years confusion has reigned as to the validity and effectiveness of obscenity statutes. Decisions of the United States Supreme Court virtually halted prosecutions under such statutes. Upholding the statute here through what could only be impermissible and excessive straining on our part might add months or years of unnecessary uncertainty and confusion to the long hiatus that has already occurred. Eventually and almost certainly, in my opinion, review of these cases or other relevant cases in the Federal courts would result in a determination of unconstitutionality of the statute. See *Literature, Inc. v. Quinn,* 482 F. 2d 372 (1st Cir. 1973).

By our ruling today, the Legislature is made aware that the statute, G. L. c. 272, § 28A, is no longer

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[a]Mass. Adv. Sh. (1974) (decided April 23, 1974).

[b]Mass. Adv. Sh. (1974) decided April 23, 1974.

viable. Simultaneously, the Legislature is apprised that, in the *Miller* case, for the first time since the free speech-obscenity dialogue began in earnest, guidelines for a constitutionally acceptable objective standard for obscenity statutes have been established by the United States Supreme Court. Moreover, such statutes may now be construed by community, rather than national, standards.

Thus the Legislature may now at its option, without further delay or confusion, determine whether the Commonwealth should or should not have a new obscenity statute or statutes. If it decides that question affirmatively, it alone has the privilege of defining, within constitutional limits, the conduct which shall be proscribed. It is not for this court to make those decisions.

Nevertheless, if the reasoning of the three dissenting Justices of this court in the *Capri* case, *supra,* were to prevail, it would in effect require that we should make those legislative determinations. I respectfully suggest that these Justices are applying the same type of subjective individual judgments that some or all of the Justices of the United States Supreme Court have applied in the last two decades of judicial confusion in this area of the law. Bickel, The Supreme Court and the Idea of Progress, 50-58 (1970). The fact that an "exhibitor" or "any competent adult," as referred to in the dissenting opinion in the *Capri* case may conclude that the subject matter is obscene, in the sense that it is tasteless or degrading, does not necessarily support a conclusion that those persons are or should be aware that the same matter is *legally* obscene within the meaning of any statute. The legal concept has been complicated by a series of United States Supreme Court decisions. These raised a mythical and mystifying national

standard of First Amendment protection. They also provided First Amendment protection on the basis of social worth that was all but imperceptible in some cases. For example, in *"John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.* 383 U.S. 413 (1966), the court held that "Memoirs" was protected by the First Amendment, although Mr. Justice Clark summarized its total vulgarity (383 U.S. at 445-446) in a list that, for length and strength, is at least a match for the similar synopsis on which the dissent relies in the *Capri* case, *supra.*

In a long series of cases the Supreme Court has invariably, with two inexplicable exceptions,[1] reversed all judgments based on findings of obscenity in cases which apparently involved all types of alleged pornography.[2] The phrase "hard-core pornography," upon which the dissenters apparently rely in their reasoning, is little more than a cliché which has not been defined in any case, nor has it apparently been a premise for the affirmation of even one judgment of guilt. Even the three decisions of the Supreme Judicial Court which are relied on in the dissent in the *Capri* case, *supra,*

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[1]*Ginzburg v. United States,* 383 U.S. 463 (1966). *Mishkin v. New York,* 383 U.S. 502 (1966).

[2]*Times Film Corp. v. Chicago,* 355 U.S. 35 (1957). *Mounce v. United States,* 355 U.S. 180 (1957). *One, Inc. v. Olesen,* 355 U.S. 371 (1958). *Sunshine Book Co. v. Summerfield,* 355 U.S. 372 (1958). *Kingsley Intl. Pictures Corp. v. Regents of the Univ. of the State of N.Y.,* 360 U.S. 684 (1959). *Smith v. California,* 361 U.S. 147 (1959). *Marcus v. Search Warrant of Property at 104 East Tenth St., Kansas City, Mo.,* 367 U.S. 717 (1961). *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962). *Jacobellis v. Ohio,* 378 U.S. 184 (1964). *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964). *Tralins v. Gerstein,* 378 U.S. 576 (1964). *Grove Press, Inc. v. Gerstein,* 378 U.S. 577 (1964). *Trans-Lux Distrib. Corp. v. Board of Regents of the Univ. of N.Y.,* 380 U.S. 259 (1965). *Redrup v. New York,* 386 U.S. 767 (1967). *Kois v. Wisconsin,* 408 U.S. 229 (1972).

as authoritative constructions of the statute, were all reversals of convictions. *Commonwealth v. Palladino*, 358 Mass. 28 (1970). *Commonwealth v. Donahue*, 358 Mass. 803 (1970). *Commonwealth v. Bitsocos*, ... Mass. .... (1972).[c]

We should take notice of abundant empirical evidence that the community has tolerated increasingly permissive displays of pornographic literature and X-rated movies. Ultimate sexual acts have been depicted in scores of moving pictures and regularly shown in theatres in all of the urban communities, and many of the suburbs and rural areas, in the Commonwealth. From one such motion picture the male star received an Academy Award nomination for a performance which included repeated and explicit scenes of coitus with the female costar. Photographs of these actors, in sexual congress, also appeared in our national news magazines of widest distribution. It is not surprising if, in all these circumstances, some police and prosecutors, or the defendants in these cases before us, concluded that the national standard superimposed on our local law had reached a state of almost unlimited permissiveness. These developments of the most recent several years have not been refuted by any firm language of this court or the United States Supreme Court. Thus I cannot conclude that we have authoritatively construed our statute in the manner demanded by the *Miller* case.

Finally, I offer one collateral thought. Justice Kaplan's concurring opinion expresses the idea that the holdings of the *Miller* case and related recent cases are "probably transient." I share his suspicion. In a very few years the Supreme Court has gone from

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[c]Mass. Adv. Sh. (1972) 641.

the *Roth-Memoirs* standard all the way to the *Miller* standard. In between there was a temporary reversal of direction in the *Ginzburg* and *Mishkin* cases, *supra*. Similarly, certain crucial rules relating to the right to counsel as established in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), were all but vacated by the severe limitations of *Kirby v. Illinois*, 406 U.S. 682 (1972), just five years later.[c] Likewise, the relative certainty concerning search and seizures related to automobiles, as established by *Chambers v. Maroney*, 399 U.S. 42 (1970), was cast into confusion by *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the very next year. See *Commonwealth v. Haefeli*, ... Mass. .... (1972).[d] Certainly constitutional interpretation must respond to social change, but this duty does not explain speedy overruling of new doctrines. These turn-arounds are followed by serious consequences to many people in every community. Especially in the area of constitutional-criminal law all concerned are entitled to a substantial measure of stability and predictability.

KAPLAN, J. (concurring). The latest, but probably transient, view of a majority of the Supreme Court of the United States seems to demand of a State statute on criminal "obscenity" that it should comprise specifics, thus reverting to the style of the motion picture production code sponsored by the late Will H. Hays.[1] I agree

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[c]I recognize that the plurality in the *Kirby* case implied that it was merely clarifying what had always been the law. Nevertheless, I suggest that most trial judges, after the *Wade* case and prior to the *Kirby* case, were applying the rule that the suspect was entitled to assistance of counsel at all pre-trial identification procedures, before or after complaint or indictment.

[d]Mass. Adv. Sh. (1972) 423.

[1]See Inglis, Freedom of the Movies, 205-219 (1947).

that the tired words of our statute do not have the magical property of instantly conforming their meaning to the hypothesized statute, and therefore I join in the court's opinion.

Persons with a reflective or experimental turn of mind might welcome an opportunity to observe how New England communities would carry on over a period of time without the assistance of suppressive law. The prospect is remote. The court's opinion is likely to be understood as an urgent invitation to our legislators to draft and pass the indicated statute. Therefore I think I should say that such an enactment would present for independent consideration a question of constitutionality. For the time being the doubt would not arise from the Constitution of the United States, for in that respect all are bound by the latest decisions of the Supreme Court; rather it would arise from the Massachusetts Declaration of Rights. In applying that fundamental document, one would have to consider whether to align oneself with the four dissenting Justices of the Supreme Court who believe a State is without power to intrude on the choice of an adult who knowingly and willingly seeks out a pornographic work. According to their conception, a pornographic communication is still a communication which the free press guaranty protects at least to the extent mentioned; in that regard it does not differ from other messages that many would consider profoundly anti-social, for example, the writings of Henry George on the single tax.

If this view should prevail, our courts would be relieved of the anomalous duty of serving as literary and artistic constables, and the Commonwealth would be spared the phenomenon of judges (very few of them

women) trying as official censors to assess the incitive or emetic qualities of movies or books that a considerable fraction of the population, pursuing their own tastes, desire to see or read. The reallocation of judicial resources to tasks that judges are better schooled to handle might be thought to be in itself a distinct gain.

BRAUCHER, J. (dissenting, with whom Reardon and Quirico, JJ., join). For the reasons stated in our dissenting opinion in *Commonwealth v. Capri Enterprises, Inc., post,*[a] we do not agree that G. L. c. 272, § 28A, is unconstitutionally vague under the standard of *Miller v. California,* 413 U.S. 15 (1973). We should proceed to decide these cases, applying the *Miller* standard. Since the court does not consider any issues relating to the application of the *Miller* standard to the facts of these cases, we forbear further discussion.

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[a]Mass. Adv. Sh. (1974) decided April 23, 1974.